A COMPARISON

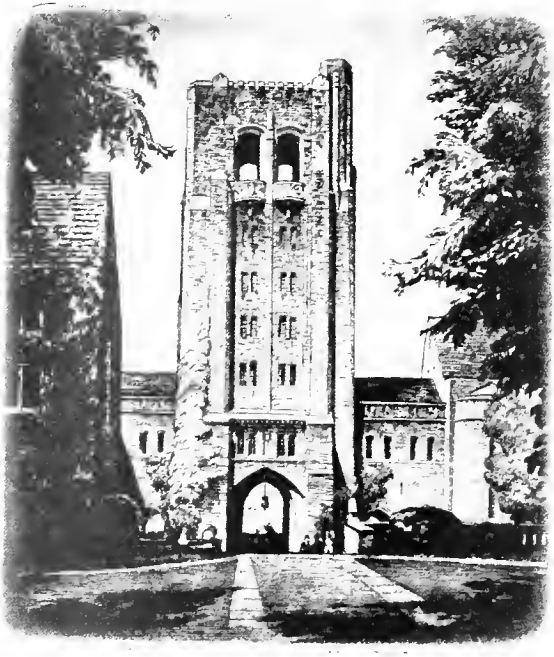
BETWEEN THE

FEDERAL CONSTITUTIONS

OF

CANADA AND AUSTRALIA

R. C. TEECE.



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BY

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PREFACE.

THE man who enters upon a comparison of the Federal Constitution of Canada with that of Australia has two courses open to him. Which he is to adopt will be determined by the meaning he puts upon the word "Constitution." If he interprets it to mean in each case one particular enactment of the Imperial Parliament, to which the term Constitution is usually applied, he will merely have to compare the provisions of two Acts of Parliament. But if he regards an account of the Constitution of a country as entailing a description of the structure of its different organs of government, of their powers and functions, and of their relations to one another—which, it is submitted, is the truer interpretation—his task will involve a general view of their political organisation; and to produce an adequate comparison of the two, it will require much more of him than simply to compare what we may call their Constitution Acts.

The latter is the course which the present essayist has adopted. His aim has been to compare and contrast in their principal features the frames of government under which the people of Canada and Australia, respectively, have been united and live as citizens of a Federal State, while they retain their status as subjects both of the Empire and of distinct though federated colonies.

The plan pursued has been to divide the essay into two parts. In the first part the two Constitutions have been compared as types of Federal Constitutions. The nature of a Federal State has been demonstrated, its essential features described, and the presence of these characteristics of Federalism examined and compared in the respective Constitutions.

As the first part contains a general, the second consists of a more particular comparison. That is to say, the various parts of the constitutional edifice in each country, with their respective powers and functions, have been examined, and the two Federations compared in respect thereof, so far as such particular comparison has not been involved in the first part of the essay.

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THE British Empire contains at the present time three instances of Federal Union under the Crown—the Federation of the Leeward Islands, the Dominion of Canada, and the Commonwealth of Australia. But as the first-named Federation has only the status of a Crown Colony—that is, though possessing representative institutions, it does not enjoy responsible government—it may with truth be said that the Dominion of Canada and the Commonwealth of Australia occupy a peculiar position among the self-governing colonies of the Empire as Federations under the Crown. The aim of this essay is to compare the Constitutions of these two Federations in their more important features; but before instituting such a comparison, it will be well to clear the ground by demonstrating the peculiar nature of Federalism as a system of government, and by noting its distinctive characteristics.

A federal state has been defined* as "a political contrivance to reconcile national unity and power with the maintenance of state rights." That is to say, a federal state is the system of government that must be adopted when the people of a number of mutually independent communities, closely connected by such ties as a common history, a common origin and language (though Canada is a notable exception in this point), similar laws and political institutions, local contiguity and the recognition of common interest, desire for many purposes to unite as a single nation, and yet to maintain the individual existence of their several communities, and in those matters which are not primarily of common interest to leave the authority of their own communities unimpaired. The system of government, therefore, under which such a people will unite, must be one which will provide for the establishment and maintenance of a central or national government, to which the component States will surrender full powers over all matters of common or national concern, while they

* "Dicey's Law of the Constitution," c. iii.

retain, and have secured to them, full powers over local affairs and matters not primarily of common interest. From this attempt to reconcile the existence of national sovereignty with the continuance of state or provincial sovereignty springs the distinctive mark of Federalism, its dualism, that is, the existence in the same country of two governments, distinct in their organisation and action, and mutually independent in the exercise of their authority, each claiming and enjoying the obedience of the people. In Mr. Bryce's words its most striking and pervading characteristic is "the existence of a double government, a double allegiance, a double patriotism."

The best and most completely developed example of a federal state in history is the United States of America. The people of the American States were practically of common origin; they spoke the same language; lived side by side on the same continent; enjoyed similar political institutions, and were governed by the same English common law; had fought side by side in the War of Independence; felt the need of a freer and less restricted intercourse for purposes of trade and commerce, and desired generally a closer relationship "to ensure domestic tranquillity, provide for the common defence, and promote the general welfare." At the same time there were many forces militating against national union. The sentiment of local independence was intensely strong, and showed great suspicion of any external authority; and the extraordinary jealousies of the various States, one toward another, had been but little abated even by their common resistance against England. Any scheme of union which sacrificed the individual existence of the States, or which restricted their powers to too narrow a sphere, was impracticable. Still the independent powers of the States must not be so wide as to imperil national unity; and above all the National Government must in the exercise of its authority act directly on the individual citizens, and not through the States. Otherwise the result would be a mere Confederation or League of States, a system which had already signally failed in America.

Thus the founders of the American Constitution had a double problem to encounter. They had to create a National Government which, while it was not to supersede the Governments of the States, was yet to exercise a direct authority over the citizens. And, secondly, they had most carefully "to determine the relations of this Central Government to the component States as well as to the individual citizens." In the means they employed to solve this problem we find the salient features of Federalism. These features are briefly :—

1. An elaborate distribution of powers between the National Government and the separate States (or Provinces). This is necessarily involved in the aim of a Federal State. The powers given to the Central Government are so

many limitations on the authority of the separate States; and, again, exclusive powers may be vested in the separate States, which in their turn are limitations on the central authority. As it is not intended that one Government should encroach upon the rights vested in the other, their respective spheres of action are subjected to careful definition. The details of this distribution vary under every different Federal Constitution, but the general principle on which it rests is obvious. All matters that concern the nation as a whole are placed under the control of the Central Government: all matters of purely local or provincial concern remain within the power of the States or Provinces. But between these two sets of clear powers there lies a large field of legislative and administrative activity, which is differently distributed in different systems. And Federations may be separately distinguished according to the principle on which they apportion this extensive borderland of powers.

2. The second feature of Federalism is that in the exercise of their respective powers both Governments act, for the most part, directly on the citizens and independently of each other.

If the Federation of the States is to result in a real national union, and not a mere Confederation or League of States, the Central Government must execute its laws, and enforce compliance with them by its own officers acting directly on the citizens. Dependence on the help of the State Governments in the execution thereof is a constant source of weakness. If a State Government disagree with the policy of the Central Government, it could then prevent the enforcement of the latter's law, and the supposed national unity would be a delusion. On the other hand, except in regard to those powers that they have surrendered to the Central Government, the States retain all their old authority, and within their sphere act on the citizens as though the Federal Government did not exist.

3. Thirdly, in the Constitution of every Federal State we find the recognition, to a certain extent, of the several States as independent and separate factors in the construction of the National Government. In contemporary Federal States the recognition of this principle finds expression in the Constitution of one of the Legislative Chambers on the basis of State representation. While in one chamber—usually called the popular chamber—the principle of representation is the equality of the citizens of the nation, in the other, though the principle of State equality has in some cases received only a partial recognition, State representation has invariably been the basis. The reason of this peculiarity is, that while a Federal State is a nation of individual citizens, it is also a union of co-ordinate States, and such a system of representation is necessary to reassure the smaller States, who would otherwise be liable to be overborne by the larger States, and in matters where their interests as States conflict would not receive that equal consideration which their position as bodies co-ordinate with the larger States required. Thus, in the United States, the Senate is composed of two

representatives from each State, and in Switzerland each canton sends two delegates to the States Council. In Canada, though the Senate is constituted on the basis of State representation, the principle of State equality is less completely recognised, the three maritime provinces together, for the purposes of representation in the Senate, being regarded as equivalent to each of the larger original provinces.

4. The fourth characteristic of a Federal State is the existence of a judiciary to decide disputes and conflicts of authority between the two co-ordinate governments: to keep each within the limits of its authority by pronouncing invalid any law which it may pass in excess of the powers conferred upon it. In every such dual system—a system which comprises two mutually independent and co-ordinate governments covering the same ground, each restricted in the area of its powers, and forbidden to transgress upon the limits of the other—there must of necessity be some extraneous body to prevent them from acting in excess of their respective powers, and from encroaching on each other's domain; and, in the event of their passing conflicting laws, to decide which of the two must, according to the Constitution, prevail. Such a body, too, must be independent alike of the Central and Provincial Governments, else it will be liable to allow too much latitude to that one on which it is dependent. Without such a provision there would be constant encroachment by legislation of one Government on the sphere of the other, ever-recurring conflicting laws, and consequent chaos and failure of the Federal system, which must break down if the two Governments fail to keep each within its own sphere.

5. The fifth characteristic of Federalism is a Supreme Law—known as the Constitution—which will embody the above-mentioned principles, whose provisions can only be amended by some authority above and beyond the ordinary legislative bodies, whether central or provincial. The necessity of such a Supreme Law can be easily deduced from the other features of Federalism. This dual system of government involves, as we have shown, an elaborate distribution of powers between the States and the Nation, and the delimitation of the powers granted to each. If the National Government were able to extend the powers vested in it, the component States would have no guarantee for the continuance of that amount of independence reserved to them when they entered the Federation. If the Legislature of a State or Province could extend its powers, the authority of the Central Government would be illusory. The very nature of Federalism, then, demands that there should be such a Supreme Law, defining the powers of the Central and State Governments, and declaring illegal and invalid any law that they might pass in excess of those powers. For the same reason it follows that it must be beyond the competence of both the Central and Provincial Legislatures to alter that Supreme Law. The authority to do that must be vested in some body in which the legal sovereignty of the Federation will thus reside. In the majority of Federal States this power is vested in an organisation of the Nation distinct from the organisations of the Governments.

Such are the chief characteristics of a Federal State, and an examination of the Constitutions of Canada and Australia will show that they exist therein also, although to a different degree in the different Constitutions. For the framers of those Constitutions entered on their work under very similar conditions to those which beset their American predecessors. They, too, in evolving a scheme for national union found that, while there were many forces making for unity, there were also many other forces tending to keep the component communities apart, and to make them jealous of their independent existence. And, like the American statesmen, they found in the Federal system a means of reconciling these opposing forces. In Australia there lived side by side on an island continent, whose very physical features made for political union, a group of communities of common origin and common language, with identical political institutions and similar modes of life and thought, and separated by merely artificial boundaries. Yet, despite this, there were strong interprovincial jealousies, and a widely prevalent feeling that the interests of the various States were not sufficiently identified to justify union on a unified, as distinct from a Federal, basis. But, while the Federation of Australia was the result of the desire of the people of the various Colonies to unite, the Federation of Canada was due as much to the desire of the people united in one of the component Colonies to separate, or at any rate to be less closely united. Twenty-six years before the Federation what are now the two distinct provinces of Quebec and Ontario (but then called Lower Canada and Upper Canada) had been formed into one province of Canada, after having been separated for fifty years. But the Union had not been successful. The great majority of the people of Lower Canada were of French origin, and clung tenaciously to the French language, to French laws and French institutions, while the people of Upper Canada were mainly of English descent. The British colonists were divided by old party lines, while the French, united by local interests, race and religion, were able to hold the balance of power, and they succeeded, especially in securing an expenditure of the revenue of the united Provinces quite disproportionate to the just claims of their Province, and in denying to the people of Upper Canada such representation in the Legislature as their numbers entitled them to. Irritation increased, and the need for some change became imperative. At the same time there were many forces that militated against complete separation. The people of both Lower and Upper Canada found one tie in their common devotion to the Crown of England; other ties sprung from their local contiguity and commercial connections. In addition, some of the other North American Colonies were manifesting a desire for Union with Canada and each other, and a solution of the problem was suggested by the Constitution of the Great Republic on their borders. The result was the estab-

lishment of the Dominion of Canada by the passing of the British North America Act, which, while it separated the two discordant parts of the Province of Canada, brought them together again with the other Colonies of New Brunswick and Nova Scotia as the component Provinces in the New Federation.

Thus the Constitutions of both Canada and Australia are Federal in nature. In the latter six States, in the former seven Provinces, are united under a system by which, while they have surrendered many of their most important powers, they yet retain very large spheres of independent action. The Governments of both countries reveal that dualism which we have shown to be the characteristic mark of Federalism—the existence of two Governments over the citizen, yet each to a large extent independent of the other. The complexity that results from such dualism is further increased by the presence of another factor, which is absent from the Constitutions of such Federations as the United States and Switzerland, namely, the presence of a third power over and above the Federal and Provincial (or State) Governments. In the words of their respective Constitution Acts the component communities have federally united "under the Crown of the United Kingdom of Great Britain and Ireland." That is, while both Canada and Australia are separate political entities with Constitutions of their own, they are also parts of the British Empire. The citizen of both those countries lives under a threefold system: he is subject to the Imperial, the Federal and Provincial Governments. But whereas the authority of the two latter are strictly limited to certain defined spheres of action, the authority of the Imperial Government is superior to both, and is absolutely sovereign and uncontrolled. The sources from which this Imperial authority is derived are two in number—the sovereignty of the Imperial Parliament over the whole Empire, and the prerogative of the Crown.

1. The absolute sovereignty of the Imperial Parliament over the whole Empire is the distinctive feature of the British Constitution; and its authority over Canada and Australia may be exercised both directly by legislation, or indirectly by its control over those who wield the prerogative powers of the Crown. Any law that it passes, the provisions of which, in direct terms or by necessary intendment, are to be applied to either country, will be of paramount authority, and will override any law, Federal or Provincial, that may conflict with it. Further (by the Colonial Laws Validity Act), any Federal or Provincial law, "which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

It will thus be seen that the authority of the Imperial Parliament is very real. But as a matter of policy, and in accordance with what are now well-established constitutional conventions, the Imperial Parliament will not interfere in the domestic affairs of either the Federation or a State (or Province) except on request, and for the convenience of the Parliament that makes the request. It will confine its activity to matters of Imperial import—matters in which other parts of the Empire than Canada or Australia are concerned, or in which it is desirable that there should be a uniform law throughout the Empire.*

2. The second source of Imperial authority over Canada and Australia is the prerogative and other discretionary powers of the Crown.

As integral parts of the British Empire, the Crown has the right to represent them internationally, to determine their relations to foreign powers, to make peace or war, and to control their military forces.

As colonies of the Empire, the Common Law Powers of the Crown over them are very extensive; but many of these have been modified by Statute, and others have been placed on a statutory basis. The British North America Act, the Commonwealth Act, and the Constitution Acts of New South Wales, Victoria, Queensland and Western Australia declare the Crown to be an integral part of the Legislature. In the Constitutions of the Canadian Provinces, the Lieutenant-Governors take the place of the King; but in all these systems alike the powers of the Crown in legislation are wielded by Governors-General, Governors or Lieutenant-Governors. The two Governors-General and the Governors of the Australian States in their exercise of these powers are responsible to the Crown, or more correctly to the Secretary of State for the Colonies. On the other hand, the Lieutenant-Governors of the Canadian Provinces are responsible not to the Colonial Secretary, but to the Governor-General, a significant distinction of which we will treat later.

Another prerogative of the Crown is the right to appoint the Governors who represent it in the Colonies. This right has been differently treated in the different Constitutions of the Dominion, Commonwealth, States and Provinces.

The British North America Act and the Constitution Acts of the Australian States, though containing many provisions relating to the Governor-General and Governors, leave them to be appointed by virtue of the prerogative power, while in the Commonwealth Act this right is definitely set on a statutory basis. The Lieutenant-Governors of the Canadian Provinces are appointed by the Governor-General, and are, as we have said, responsible to him, an arrangement at variance with the dualistic characteristics of Federalism.

* For example, Foreign Enlistment and Copyright.

Again, the Crown has the right to disallow Colonial Legislation. This right has been restricted in such a way that it must be exercised within a certain time; and, in the case of the Canadian Provinces, it has been taken away from the Crown and vested in the Governor-General, another provision in conflict with the Federal principle.

Further, the executive power in every colony is vested in the King, though always exercised by the Governor as his representative. At first sight this statement seems at variance with the Canadian Provincial Constitutions, which vest this power in Lieutenant-Governors without any mention of the King. But the Privy Council, in the case of the Maritime Bank of Canada *v.* the Receiver-General of Brunswick,* declared that "a Lieutenant-Governor when appointed is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of dominion government."

Lastly, in the domain of the judicial power, the Crown has the right to hear appeals from colonial courts. Under certain conditions a dissatisfied litigant has of right an appeal from the Supreme Court of any State or Province to the Privy Council; and that body can always grant special leave to appeal to it from the decisions of the Supreme Court of the Dominion, the Commonwealth, and any Province or State. There is but one limitation on this right. In constitutional questions there is no appeal from the High Court of Australia, except by leave of that Court.

With such extensive powers vested in the Imperial Government, the naturally complex character of the two Federal systems is still further increased. But in the exercise of those powers of self-government left to the two countries by the policy of the Imperial Government, and the established constitutional conventions, we find the continual presence of that dualism which we have shown to be of the essence of Federalism. In both Canada and Australia may be seen the spectacle of two distinct governments, which are, broadly speaking, co-ordinate and mutually independent, and each within its own sphere supreme, save for the paramount authority of the Imperial Government, although, as we shall see, this is true to a greater degree of Australia than of Canada, where we shall find several important departures from a true Federal type.

Both of the Acts establishing the respective Federations presuppose the existence of completely organised Provincial (or State) Governments. Especially is this to be remarked in the Commonwealth Act, in which the short chapter headed "The States" deals almost wholly with their relations to the Commonwealth, and makes no provision for their Constitution, except to enact that "the Constitution of each State of the Commonwealth shall,

* 1892, Appeal Cases, 443.

subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

Thus, except in respect of those definite powers, of which the Commonwealth Act divests the States, either absolutely by vesting them exclusively in the Commonwealth, or prohibiting their exercise to the State, or contingently by empowering the Commonwealth in its discretion to pass laws which will override conflicting State Legislation, each State retains the same authority over its subjects as if the Commonwealth had never been called into existence. Similarly, although the British North America Act deals with the Constitutions of the Provinces as well as of the Dominion, it yet assumes their existence already, the reason for the inclusion of the Provincial Constitutions being, that the object of the Act was to divide one of the constituent provinces into two, as well as to unite all into a Federation. And, though the Act establishing the Dominion very considerably contracted their powers, and left them a far less extended sphere of authority than that enjoyed by the Australian States, yet "the object of the Act was neither to weld the provinces into one, nor to subordinate the Provincial Governments to a central authority, but to create a Federal Government, in which they should all be represented, entrusted with the exclusive administration of affairs, in which they had a common interest, each province retaining its independence and autonomy." *

And further, by clause 1 of section 92, "in each Province the Legislature may exclusively make laws in relation to the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor." Thus, with the exception of the reservation regarding the office of Lieutenant-Governor, the Canadian Provinces may, like the Australian States, amend their Constitutions independently of the Federal Government. This control of the States and Provinces over their Constitutions is one of the most significant evidences of the dual nature of the Federal system that can be adduced.

But while both Canada and Australia are governed under systems essentially dualistic, an examination of their polities will reveal several important departures from the true Federal type, and we shall find in many departments exceptions to that mutual independence which is of the essence of Federalism. Of these we shall treat under the following five heads:—

I. In the domain of Legislation.
II. In the domain of Administration.
III. In the Judicature.
IV. In Finance.
V. In the relations of the various Governments to the Crown.

* Maritime Bank of Canada *v.* Receiver-General of Brunswick. 1892, Appeal Cases, 441.

I.—IN THE DOMAIN OF LEGISLATION.

Doubtless, in an ideal Federal system all the various subjects of Legislation would be so elaborately distributed amongst the central and local Parliaments that each would have its own sphere definitely marked off, and there would be no opportunity for the two to clash in the exercise of their powers. But in Canada over two important matters—Agriculture and Immigration—and in Australia over a very large number of subjects, the two Parliaments possess concurrent powers of Legislation. Further, even in legislating upon those subjects over which each has exclusive authority, conflict will often arise. For example, both Provinces and States have exclusive power to legislate in reference to what the Americans term "the police power." But it is easy to imagine that many laws, legitimately passed by a local Parliament in respect of such power, will conflict with the terms of an Act of the central Legislature regulating Inter-Provincial (or Inter-State) Commerce. And, indeed, the legal history of the United States abounds with many such instances. In such conflicts the Federal Law is of paramount authority, and the Provincial Law must yield thereto.

Peculiar, also, to Canada is the provision giving the Governor-General of the Dominion power (which he exercises on the advice of his Council) to disallow any Act passed by a Provincial Legislature. At first sight this distinctly "unfederal" rule seems to be fatal to the independence of the Provincial Parliaments, and to render them completely subordinate to the Federal Government. But in practice the exercise of this power is regulated by well-established conventions, the effect of which is to preserve the independence of the Provincial Governments. These "conventional" rules have been well stated in a memorandum drawn up by the late Sir John Macdonald. In this he says: "In deciding whether any Acts of a Provincial Legislature should be disallowed or sanctioned, the Government must not only consider whether it affects the interest of the whole Dominion or not; but also whether it be unconstitutional, whether it exceeds the jurisdiction conferred on local Legislatures, and in cases where the jurisdiction is concurrent, whether it clashes with the Legislation of the General Parliament, as it is of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and the general interests of the Dominion imperatively demand it."

And in practice this power of disallowance has been very sparingly exercised, and only in cases in which, in the opinion of the Dominion Government, the objectionable laws are unconstitutional, or prejudicial to the Dominion as a whole, and so such as should not have been enacted by a

local Legislature. The practice of disallowing laws is, however, open to the criticism that it entails the exercise by a non-judicial body of a power which is the chief of the functions of those courts, whose authority as guardians of the Constitution is so notable a characteristic of Federalism.

In Australia the Commonwealth has no such power of disallowing Acts of a State Legislature, with one exception. By section 112 the Parliament (not the Governor-General, as in Canada) may annul State laws levying charges for inspection laws on imports or exports. But this exception may be justified on the ground that a grant of a power to a State to levy such charges is itself an exception to the exclusive right to impose customs and excise duties vested in the Commonwealth, and that such control is necessary to protect the powers of the latter over foreign and Inter-State commerce.

In all the instances detailed above it will be noticed that the Australian Constitution follows out the Federal idea to a much further state than the Canadian. In this, as in many other respects, the Commonwealth is a truer Federation than the Dominion.

II.—IN THE DOMAIN OF ADMINISTRATION.

Here, again, on Federal principles the administration of the central and local Governments respectively should be conducted independently of each other. But several exceptions to this rule may be found in both Canada and Australia. Most of these are of minor importance, and do not call for notice at this point. The chief exception here again is peculiar to Canada, and occurs in the appointment of the head of the Provincial Administration.

In America each State appoints its own Governor; in each Australian State, as is to be expected in a British Colony, the Governor is appointed by the Imperial Government. In both cases the Federal Government has absolutely no concern whatever in his appointment. In Canada, on the contrary, the Provincial Governors are appointed by the Governor-General in Council. They are responsible to the Dominion Government for the exercise of their powers, and may be removed by the Governor-General, acting on the advice of his Ministers. But in this, too, as in the case of the Dominion, power of veto over Provincial legislation, the result which might naturally be expected—the subordination of the Provincial to the Dominion Government—is avoided by the fact that a Lieutenant-Governor exercises his functions in accordance with the acknowledged principles of responsible government. He acts on the advice of a Council composed almost wholly of the heads of departments; and the members of that Council are selected from the dominant party in the Assembly, and hold office only so long as

they retain the confidence of the Assembly. Thus, although the Lieutenant-Governor is a Dominion officer, the result is that the Provincial Administration is under the control of the Provincial Parliament, and in practice is really as independent of the Dominion as a State Administration is of the Commonwealth.

III.—IN THE JUDICATURE.

The model of the judicial system of a Federal State is displayed in the United States. There we find a Federal Judicature, which in the last resort is the sole interpreter of the Federal Constitution and of Federal Law, and which exercises exclusive jurisdiction over certain definite subjects, and over cases in which the parties (or one of them) belong to certain specified classes; and in each State there is a State Court, which alone has jurisdiction to interpret the State Constitution and State Law, while the Federal Courts have absolutely no appellate jurisdiction therefrom, except when Federal Law, Federal treaties, or other Federal instruments conflict, or are alleged to conflict therewith.

On the other hand, the Supreme Court of Canada and the High Court of Australia may both hear appeals from the Provincial or State Court even on questions involving merely the interpretation of Provincial or State Law.

This system has a very distinct practical advantage in contributing towards uniformity of law throughout the respective Federations. In America the Supreme Courts of the different States have variously interpreted the Common Law and even Statutes which have been framed in the same terms in different States, and the result has been great diversity of law throughout the United States. But in Canada the Supreme Court, and in Australia the High Court, will continue the work that the Judicial Committee of the Privy Council has done before the Federation—the work of maintaining uniformity of law throughout the respective countries. The objection may here be put forward that the Privy Council may still be entrusted with the task of maintaining uniformity of law, and the Federal Court be confined to the interpretation of Federal Law. But the answer to this is the very practical benefit to suitors obtained by the existence of a final Court of Appeal within their own borders, and the consequent saving of time and expense.

Apart from this appellate jurisdiction of the High Court, we find in each Australian State—as is to be expected in a Federation—two distinct and independent judicial systems.

The Federal judicature consists of a Supreme Court—to be called the High Court of Australia—and such other Courts as the Parliament may create, or invest with Federal jurisdiction. In addition, there is the Inter-State Commission, which is a quasi-judicial body.

The jurisdiction conferred upon this judicature is of two kinds—original and appellate. The Constitution vests an original jurisdiction in the High Court, which Parliament may extend to other Federal Courts, in all matters—(1) arising under treaty; or (2) affecting consuls or other representatives of other countries; or (3) in which the Commonwealth is a party; or (4) arising between States, or between residents in different States, or between one State and a resident in another; or (5) in which a writ of *mandamus* or prohibition or injunction is sought against an officer of the Commonwealth. In addition, the Parliament is empowered to confer an original jurisdiction in any matter—(1) arising under the Constitution, or involving its interpretation; (2) arising under any laws made by the Parliament; (3) of Admiralty and Maritime jurisdiction; (4) relating to the same subject-matter claimed under the laws of different States. Both these classes comprise cases of an essentially Federal and Inter-State character, and Parliament may make laws declaring such jurisdiction to be exclusive of that of the Courts of the States.

The appellate jurisdiction of the High Court is very wide. It extends to the hearing of appeals from all judgments, decrees, orders and sentences —(1) of any Justice or Justices exercising the original jurisdiction of the High Court; (2) of any other Federal Court or Courts exercising Federal jurisdiction; (3) of the Inter-State Commission on questions of law; and (4) of the Supreme Courts and certain other courts of the States. In this last respect the High Court possesses a double character. Where the appeal involves the interpretation of the Federal Constitution or of some Federal law, or the case is one which the character of the parties renders a subject of essentially Federal jurisdiction, it is a Federal Court of final resort, unless special leave can be obtained from the Privy Council to appeal therefrom. But, when the case under appeal is one that is determined solely under the laws of a State, and in which the parties are both resident in that State, it is not a Federal Court, but a Court of Appeal from the State Court, whose territorial jurisdiction is co-terminous with that of the State Supreme Court.

At the same time co-existent with these Federal Courts, there will continue throughout the States of the Commonwealth their already established judicial systems. And any case, so long as it does not involve a matter of Federal jurisdiction, which is commenced in a State Court, may be determined without ever coming under the cognisance of a Federal Court. Even if a dissatisfied litigant wishes to appeal from the judgment of the State Court, he may ignore the High Court, and appeal direct to the Privy Council.

The Canadian judicial system presents a much more marked departure from the Federal type. It is of a most complicated nature, and baffles any attempt at a logical classification on the basis of the fundamental dualistic

principle of a Federal State. Unlike the Australian Constitution, which directs the establishment of a Federal Judicature, the British North America Act merely states that the Parliament may "provide for the Constitution, maintenance and organisation of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the Laws of Canada." *

The first and most important court established by the Parliament in pursuance of this section is the Supreme Court of Canada. Like the High Court of Australia, this Court possesses a double character. In respect of part of its jurisdiction it is simply a Court of Appeal from the Provincial Courts; but it has also a limited original jurisdiction in matters of a purely Federal nature. In any suit, action or proceeding in which the question of the validity of an Act of the Federal or of a Provincial Legislature is raised, when in the opinion of the judge such question is material, the case is to be removed into the Supreme Court for the decision of the question. But the exercise of this jurisdiction was made conditional on the province in whose court the question arose, passing a law empowering the Supreme Court to decide such questions, and defining the classes of cases which might be thus removed. Thus there is presented the curious anomaly of a Federal Jurisdiction dependent on the permission of a Provincial Legislature.

The Supreme Court also exercises an appellate Federal Jurisdiction in entertaining certain classes of appeals from the second court established under section 101—the Exchequer Court. The cases within the jurisdiction of this Court may be divided into three classes:—First, those of an essentially Federal character; secondly, those which are of a Federal nature, but the power to take cognisance of which is dependent on the action of the Provincial Legislatures; thirdly, those strictly of a provincial character. The first class includes certain specified varieties of claims against the Crown—that is, the Dominion Government,—cases relating to the revenue, and all actions or suits in which the Crown is plaintiff or petitioner. The second class comprises controversies between the Dominion and a province, or between two provinces, both of which have passed the necessary enabling statute. The third class includes certain claims against, and actions by, the Crown, where the Crown is represented by a Provincial Government. With certain limitations an appeal lies from the Exchequer Court to the Supreme Court, and where the case falls in either of the first two classes, the jurisdiction of the latter court thereby invoked is a Federal Jurisdiction.

The third Federal Court constituted by the Dominion Parliament is the Maritime Court of Ontario. This, though established in one province only, and possessing jurisdiction "in matters arising out of, or connected with,

* Section 101.

navigation, shipping, trade or commerce on any river, lake, canal or inland water of which the whole or any part is in the province of Ontario," is a Federal Court because trade and commerce, navigation and shipping, are under the exclusive authority of the Dominion.

Finally, the Dominion Parliament has assigned to certain provincial courts the trial of petitions arising out of elections of members of the House of Commons. The effect of this is to invest those provincial courts with Federal Jurisdiction, and while hearing election petitions such courts are Dominion, not provincial tribunals.

These four are the only Federal Courts exercising an original Federal Jurisdiction, and in the majority of disputes which call for the intervention of a court of law the Constitution and Federal Laws have to be interpreted by the provincial courts, and in the last resort by the Supreme Court, or the Judicial Committee of the Privy Council. The same set of courts, as a general rule, deals with questions arising under Federal statutes, and with those arising under provincial statutes, and the Supreme Court entertains appeals from all other courts.

Two other features of the Canadian judicial system illustrate the confusion of the Federal with the Provincial Jurisdiction. Criminal Law and Procedure is under the exclusive authority of the Dominion Parliament, but is administered by provincial courts. Secondly, the judges of the provincial courts are appointed by and receive their salaries from the Dominion Government. These peculiar characteristics of the Canadian Judicature, which we have detailed, justify us in saying that their judicial system is characteristic, not so much of a Federal nation, as of one comprising a number of dependent provinces, each with its own system of courts, but courts which, as they are courts of a dependency, are liable to have their decisions reviewed by the national tribunal.

IV.—IN FINANCE.

In the United States Federal and State Finance are absolutely unconnected. For though the Federation took over all the debts of the old Confederation, including the war debt, it assumed no responsibility for State debts; nor was it required to return any surplus revenue to the States. Thus the Federal Government has no financial dealings with the States, except in the way of contract. Contrary to this system, both in Canada and Australia, Federal and Provincial (or State) finance have many points of contact. The need of some connection between the two has been proved by American financial history. As the Federal Government has exclusive control over customs and excise duties, there has flowed into their coffers a huge revenue far in excess of their requirements. Since the Constitution made no provision for the assumption of State

debts, or the return of surplus revenue, this has resulted in extravagant expenditure and wasteful financial administration, while the States have had to impose heavy direct taxation to meet their obligations. The evil has grown so great that Congress, in order to reduce its huge surplus, once had to resort to making a voluntary refund to the States, and at present finds an outlet for it in the lavish bestowal of pensions.

A knowledge of this evil has led to a different system being adopted in Canada and Australia.

Under the British North America Act not only did the Dominion take over the public debts of the provinces (the interest and charges on which would dispose of a considerable part of any surplus revenue), but it was also provided that the Dominion should grant definite annual subsidies, and a *per capita* grant in addition, to the provinces for the purposes of provincial government. And a very great part of the revenue of the provinces consists of these Federal subsidies.

The Commonwealth Act does not require the Federal Parliament to take over the State debts, but merely empowers it to assume them, or a portion thereof, at its discretion, in which case the States are to indemnify the Commonwealth. Section 87 (the famous "Braddon blot"), however, provides that for ten years, and "thereafter until the Parliament otherwise provides," three-fourths of the net revenue arising from duties and excise is to be paid to the several States, or applied towards the payment of interest on State debts taken over by the Commonwealth.

The basis on which this surplus revenue is to be distributed among the States until five years after the imposition of uniform duties is prescribed by the Constitution (sections 89 and 93). After that time "Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue" (section 94).

Both in Canada and Australia, however, the Provinces and States have sole control over the administration of the revenues which thus accrue to them from the Federal Treasury. And they still have large powers of taxation for provincial purposes—the Canadian Provinces by means of direct taxes and licenses, and the Australian States by any means other than duties of customs and excise. Both may still borrow money on their own credit, and may find a productive source of revenue from the sale and lease of their public lands. Thus, although the Provincial and State Governments look to the Federal Government for a large portion of their income, both have still large powers of raising revenue independently of the Central Government, and the expenditure of all their revenues is within their own exclusive control.

V.—IN THE RELATIONS OF THE VARIOUS GOVERNMENTS TO THE CROWN.

We have already remarked on the peculiar character among Federal systems which the Federations of Canada and Australia possess by reason of the participation in their polity of an exterior authority—the Crown of England. And a logical following out of Federal principles requires that, in the relation of the Central and Provincial Governments to the Crown, the two should be independent of each other. And such is the case in Australia. The effect of section 106, which expressly saves the State Constitution, is that the States still possess their right of immediate communication with the Crown, and the latter retains all its powers over the legislation and administration of the States. State bills may still be reserved for the Royal assent, and laws may be disallowed by the Crown. The State Governors are still appointed by the Home Government, to which alone they are responsible; and in all these matters the Commonwealth Government has no jurisdiction.

In Canada, on the other hand, the Crown comes into touch with the provincial organisations only mediately through the Dominion Government. In fact, in the provincial polity the Dominion Government occupies the same position as the Crown did before the Federation. Provincial bills may be reserved for the consideration of the Governor-General, and laws may be disallowed within one year after their enactment.*

Further, it has been definitely decided that the Crown—that is to say, the Imperial Government—has yielded absolutely to the Dominion Government the control it formerly exercised over provincial legislation by those means.

The Lieutenant-Governors are appointed by the Governor-General in Council; they are responsible to him for the proper discharge of their office, and may be removed by him. The Supreme Court may entertain appeals from provincial courts, although a dissatisfied litigant may still, if he prefer, appeal direct to the Privy Council.

In all these respects the Provinces appear in the light of dependencies of the Dominion rather than States in a Federal union. The explanation of this anomaly is twofold. First, it is due, perhaps, to a desire to produce in the frame of government a symmetrical series of authorities. At the head of the structure stands the Imperial Government, with exclusive power over matters of Imperial concern, leaving the Dominion practically absolute self-government in matters which concern Canada alone. At the foot lie the provinces with exclusive powers of local self-government; but to safeguard its authority over matters affecting Canada as a whole, the Dominion Government was given powers of control over the provinces very similar to those actually exercised by the Crown over the Dominion.

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*B.N.A. Act, section 90.

The second and chief explanation is to be found in the historical circumstances of the Federation. The Quebec Conference was held while civil war was raging in the neighbouring Republic; and Canadian statesmen were determined to frame a Constitution which would effectually prevent the assertion of "State rights" in a way which had entailed such disaster in the United States. So they not only arranged for the distribution of the functions of government between Dominion and provinces on a totally different basis to that of the American Constitution (a subject of consideration later in this essay), but they inserted provisions which in an emergency would enable the Dominion to control both the legislation and administration of the provinces.

The retention by the Imperial Government of its *direct* participation in the government of the Australian States, which is ensured by its appointment of Imperial officers as Governors, and its power to disallow State legislation, has been subjected to considerable criticism. Mr. R. R. Garran, in his book, "The Coming Commonwealth," says: "When a Federal Government is interposed between the Empire and the colony—so that the colony, instead of being a direct dependency of the Empire, becomes a component State in a federal dependency—the position is somewhat changed. There will be no need for even a nominal control by the Imperial Government over the individual States, seeing that Imperial interests will be fully protected by the control exercised, through the Governor-General, over the Commonwealth. State administration being confined to local subjects, will no longer be matter of Imperial concern, and there will be no longer any satisfactory reason why the State Viceroy should be appointed by or responsible to the Imperial Government." And again: "There will be no need for an Imperial veto on State legislation, because a State—under the Federal Constitution—can only deal with matters of internal administration. There is no Imperial veto over the laws of a Canadian Province, and there need be none over those of an Australian State."

In answer to this we may point out that the Federal Government has not been "*interposed between* the Empire and the colony;" that the colony, though "a component State in a federal dependency," is still "a direct dependency of the Empire," and will remain so, as long as the Commonwealth is a true federation; that, in contrast to the Canadian Constitution, which vests the powers of the Dominion Parliament (with two exceptions) *exclusively* in that body, and rigidly restricts the powers of the provinces to enumerated subjects, the majority of the powers of the Commonwealth are concurrent, and there are a very large number of subjects over which—until the Commonwealth Parliament passes laws

conflicting therewith—the State Parliaments retain their powers of legislation. Many such laws may affect Imperial interests and conflict with Imperial policy.* And as the Governor-General has no power to disallow such legislation, it is difficult to see how "Imperial interests will be fully protected by the control exercised through him over the Commonwealth;" and it is clear that there is considerable need for much more than "a nominal control by the Imperial Government over the individual States." Such control may be unnecessary in Canada, where the legislative powers of the provinces are restricted to a limited area, as compared with the powers of an Australian State, and where they affect only matters of internal administration. But when we consider the wide area of subjects on which a State Parliament may legislate, it is imperative that the Imperial Government should still be enabled to control their legislation by having an officer of their own to participate therein, and by retaining the power of veto.

We pass next to point out and compare in the two Constitutions under consideration those characteristics of Federalism which flow from its dualism. These, it will be remembered, were five in number:—

1. Distribution of powers between the Federal and Provincial Governments;
2. The direct action of each Government on the citizens, independently of the other;
3. The recognition of the States as independent and separate factors in the construction of the National Government;
4. The authority of the Judiciary as interpreters of the Constitution;
5. The supremacy of the Constitution, and the impossibility of amendment by any other than an extraneous body;

and we shall deal with these features in that order.

I.—DISTRIBUTION OF POWERS.

In framing a Federal Constitution there are two ways in which the functions of government may be distributed between the Central and Provincial Governments. One way is to vest certain powers in the Central Government, to limit its sphere of action to those powers, and to leave all the remaining functions in the Provincial Governments. The other is to allow the Provinces to retain certain powers, and to transfer all others to the jurisdiction of the Federal Government. The Americans, and in later years the Australians, adopted the first method. They gave the Federal organisation jurisdiction over certain definite subjects, and confined it to the exercise of

* Laws in reference to marriage and divorce are a good example of such.

those powers. To the States they left power to pass laws over all other subjects, and even allowed them still to legislate in many matters jurisdiction over which had been conferred on the Federal Government, with the reservation that any law which conflicted with a Federal law on the same subject was to be *ipso facto* avoided.

Thus the tenth amendment to the United States Constitution declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." And in the Commonwealth the same principle is enunciated by sections 107 and 108. Section 107 provides that "every power of the Parliament of a colony which has become a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth." And the effect of section 108 is to ensure to the States the right to repeal and alter laws on subjects within the competence of the Federal Parliament until the latter legislates theron itself.

The Canadians, on the other hand, adopted the second method. They regarded the American Civil War as an awful warning of the evil effects of an excessive limitation of the Federal authority. And accordingly they bestowed on the Provincial Parliaments jurisdiction over certain definite subjects, while the whole residuum of governmental powers was conferred on the Dominion Parliament. "For greater certainty," indeed, but "not so as to restrict the generality" of the powers vested in that body, they detailed a large number of subjects within the authority of the Dominion; but the first clause of section 91 of the British North America Act empowers the Parliament to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Further, in most Federal States we find this distribution of powers between the Central and Provincial Governments effected in two ways—positively, by conferring certain definite powers in the Central or Provincial Government, and leaving the residue in the other; negatively, by imposing certain restrictions on both Governments. The latter course may seem unnecessary. For restriction of the powers of that Government vested with the residuum of sovereignty may be as well attained by conferring the powers in question exclusively on the other Government; and it is superfluous to impose prohibitions on a Government which can only legally act within a clearly defined area of authority. Yet in both the United States and the Australian Commonwealth we find this negative bestowal of authority by the imposition of restrictions on both Governments; and

the passion for restriction has spread so much that there are certain things which are prohibited to both the Federal and State Governments. Thus, what Mr. Bryce has said of the United States, is true—though to a smaller degree—of the Commonwealth: "What the Constitution has done is not to cut in half the totality of governmental functions and powers, giving part to the National Government, and leaving all the rest to the States, but to divide up this totality of authority into a number of parts, which do not exhaust the whole, but leave a residuum of powers neither granted to the Union, nor continued to the States." Thus in Australia neither the Federal nor a State Parliament can pass laws impairing the freedom of trade, commerce, and intercourse among the States, nor impose bounties on the production or export of goods which will not be uniform throughout the Commonwealth.

In Canada this negative mode of distribution has been sparingly adopted, the only instances being found in the provisions treating of the powers of the Provinces to legislate with respect to Education, the office of Lieutenant-Governor, and certain local works and undertakings enumerated in Clauses 10 *a*, *b*, and *c* of section 92 of the British North America Act, while there are but three things which the British North America Act definitely prohibits to both Governments, namely, educational legislation infringing certain privileges mentioned in section 93,* the taxation by either Dominion or Provinces of land or property belonging to the other, and any interference with freetrade in the products and manufactures of the provinces.

This scheme of the distribution of powers is further complicated by the fact that the powers bestowed on the various Governments are not in all cases exclusive—that is, there are some matters with which both the central and provincial organisations, or either of them, may deal; and the mere grant of a power to one Government does not always of itself imply a prohibition upon the other against the exercise of the like power. Thus in Australia over the great majority of the powers granted to the Commonwealth a concurrent jurisdiction will be retained by the States, "unless from the nature of the power, or from the obvious results of its operation, a repugnancy must exist, so as to lead to a necessary conclusion" that the power must be interpreted as an exclusive one.

To this system, however, the Canadian Constitution affords a marked contrast, according to which the powers of the Provincial and Dominion Parliaments are for the most part mutually exclusive. Mr. Lefroy attributes this provision to the desire of Canadian statesmen to construct a "Constitution similar in principle to that of the United Kingdom," and especially to reproduce, as far as the conditions of a Federal State would permit, the

**Vide infra* p. 26.

fundamental principle of the supremacy of Parliament. "The British North America Act," he says, "in distributing powers between the Legislatures, provided that the respective powers of these bodies should not be concurrent, but exclusive, the one of the other, thus making each supreme in its own domain, though in the course of legal decision it has been determined that the Dominion Parliament by necessary implication must, when making a law upon the broad general subjects assigned to it, have power to deal with matters otherwise assigned to the Provincial Legislatures, so far as such laws may affect them, and that, in event of direct conflict of legislative enactment, Dominion legislation, if *intra vires*, will place in abeyance that of a Province."

From the foregoing it follows that in a Federal State we may distinguish the following classes of governmental powers:—

(1.) Powers vested in the National Government alone.
(2.) Powers vested in the States (or Provinces) alone.
(3.) Powers exercisable by either the National Government or the States (or Provinces).
(4.) Powers forbidden to the National Government.
(5.) Powers forbidden to the State Government.

(1.) Powers vested in the National Government alone.

When we remember the different principles on which the distribution of powers are arranged in the respective Constitutions, we shall expect to find the Dominion possessed of far more extensive powers than the Commonwealth. And when we further bear in mind that all the powers (with but two exceptions) of the former, and only a certain number of those of the latter are exclusive, we shall find a still greater difference herein between the two Constitutions. While the powers granted to the Dominion alone are all expressly declared so to be, those so vested in the Commonwealth may be divided into three classes, according to the grounds on which the claim to exclusive exercise is based.

The first class comprises those which are expressly made exclusive by the Constitution. They relate to the seat of Government of the Commonwealth, and all places acquired by the Commonwealth for public purposes; to those departments of public service transferred to the Commonwealth, enumerated in section 69*; to the imposition of duties of customs and excise, and the grant of bounties on production and export of goods; and to any territory which may be surrendered to the Commonwealth by a State.

The second class includes those which derive their exclusive character from their very nature, and the fact that they could never be or have been exercised by any State. Such include (*inter alia*) power to change

* Posts, Telegraphs, and Telephones; Naval and Military Defence; Lighthouses, etc.; Quarantine.

those provisions of the Constitution which are to be in force "until the Parliament otherwise provides"; to borrow money on the credit of the Commonwealth; to regulate fisheries beyond territorial limits; to ensure the service and execution throughout the Commonwealth of the civil and criminal process and judgments of State courts; to legislate on "external affairs," and the relations of the Commonwealth with the Pacific Islands and on matters referred to it by the State Parliaments; and the very ill-defined authority granted by sub-section 38 of section 51.*

The third class comprises those powers which are prohibited to the States, and thus negatively granted to the Commonwealth alone. The chief of these is the power to raise or maintain any naval or military force, and the power to coin money, and to make anything but gold and silver legal tender.

In addition, it has been contended that the power of the Commonwealth to regulate foreign and inter-State commerce must be interpreted as exclusive by reason of the results which will follow the concession of a concurrent power to the States. The discussion of this contention, which is based on American constitutional interpretation, we shall reserve for a later place.†

Although these exclusive powers comprise several which are not within the competence of the Dominion Parliament,‡ yet they are not nearly so extensive as those of the latter body, which possesses the majority of those we have detailed, and many others, which are only granted to the Commonwealth concurrently, and others again over which the Commonwealth has no jurisdiction whatever.

Thus the Dominion Parliament may regulate all trade and commerce, not only foreign and inter-provincial, but even within the limits of a single Province. It has exclusive power over all sea coast and inland fisheries; over any railways, canals, and other public works which, though situate wholly within a single Province, it may declare "to be for the general advantage of Canada or for the advantage of two or more of the Provinces;" over criminal law and procedure throughout the Dominion; and generally over all matters "not coming within the classes of subjects assigned exclusively to Legislatures of the Provinces"—a very extensive grant in strong contrast to the limited powers of the Commonwealth.

(2.) Powers vested in the States (or Provinces) alone.

In Canada these are synonymous with all but two of the powers vested in the Provinces, although, as we have already pointed out,§ their domain

*"The exercise within the Commonwealth at the request, or with the concurrence, of the Parliaments of all the States directly concerned, of any power which can at the establishment of the Constitution be exercised only by the Parliament of the United Kingdom, or by the Federal Council of Australasia."

† *Vide* p. 54 *et seq.* ‡ *Vide* p. 59. § *Vide supra*, p. 22.

may be encroached upon, when the Dominion Parliament, in legislating on the subjects assigned to it, passes a law which at the same time affects a matter put under the jurisdiction of the Provinces; in which case the Dominion law, if *intra vires*, will override any Provincial law which may conflict with it.

These powers are all detailed in section 92 of the British North America Act, and though not as extensive as those of an Australian State, yet comprise many which very largely affect the every-day life of the citizens.*

In the Commonwealth Constitution any enumeration is superfluous, for the simple reason that thereby the States retain exclusive control over all subjects, authority over which has not been conferred on the Commonwealth. Of course, in these also some encroachment by the latter will inevitably take place; for the Federal Parliament, in legislating on subjects within its domain, must affect matters left under State jurisdiction; in which case again the Federal law, if *intra vires*, will override the repugnant provisions of a State law.

(3.) Powers exercisable by either the National Government or the States (or Provinces).

Two concurrent powers stand out as exceptions to the general rule of mutual exclusiveness in the Canadian Constitution, namely, the power to legislate on agriculture in a Province, and immigration into a Province.

In Australia the concurrent powers cover a large area. They comprise briefly all the powers granted to the Commonwealth by section 51, except those few which are either expressly or impliedly within the exclusive jurisdiction of the Commonwealth, the majority of which we have detailed. The more important include powers over immigration (as in Canada) and emigration, bankruptcy and insolvency, banking and insurance (other than State banking and insurance), bills of exchange and promissory notes, and many others.

(4.) Powers forbidden to the National Government.

Writers on the English Constitution have remarked on the contrast between it and Continental Constitutions afforded by the absence in the former of all declarations and definitions of the rights of individuals—constitutional guarantees, as they have been called. This is in part due to the fact that the English is an unwritten Constitution; and in the first written Constitution adopted by an Anglo-Saxon people for their government we find the introduction of these constitutional guarantees. The Americans have embodied in their Constitution their Bill of Rights to more effectually

* They include (*inter alia*) Property and Civil rights, Incorporation of Companies, Municipal institutions, Public Lands in the Province, Shop, Saloon, Tavern, Auctioneer and other licenses, Direct Taxation, etc.

safeguard the rights of individuals against the new power they were setting over themselves. The Canadians followed the English example, but Australia has in two respects contracted the infection—first, by section 116 the Commonwealth is prohibited from establishing any religion, from imposing any religious observance or forbidding the free exercise of any religion, or requiring any religious test as qualification for any office or public trust; and secondly, by section 41 the Commonwealth may not by any law disfranchise any adult person who is an elector in a State from voting at Federal elections.

There are other prohibitions imposed on the Commonwealth by the Constitution, but their object is to protect the rights, not of individuals but of States. For the rights of States are not, like the rights of individuals, safeguarded by the operation of the ordinary law of the land, but require for their preservation the insertion of express provisions in the Constitution preventing any infringement of them by the Commonwealth.

Thus the Federal Parliament or Administration must not tax "property of any kind belonging to a State," nor "by any law or regulation of trade, commerce, or revenue give preference to one State, or any part thereof, over another State, or any part thereof; nor abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation;" nor in any law diminishing or increasing the number of Senators, give any original State less than six seats, or controvert the principle of the equal representation of the original States; nor may any original State ever be represented by less than five members in the House of Representatives.

The Canadians, on the contrary, did not believe that the rights of their Provinces were so threatened by the creation of the Dominion as to require the protection of so many express provisions restricting the central authority. The only such provisions in the first British North America Act are the prohibitions against taxing land or property belonging to a Province, and against the free admission into other Provinces of all products and manufactures of any one Province. The Imperial Act of 1871 also declares that, once the Dominion has established a Province, it cannot alter its constitution. The purpose of this is to place any new Provinces in the same position as the original Provinces with regard to their powers over their own constitutions.

(5.) Powers forbidden to the States (or Provinces.)

Of the prohibition imposed by the Commonwealth Constitution two have already been treated under the exclusive powers of the National

Government. There are, however, two more, which, like those imposed on the Commonwealth, are inserted to safeguard the rights of States. These are found in sections 117 and 102. The former protects a subject of the Queen in one State from any disability or discrimination in another, which would not be equally applicable to him if he were resident in such other State. The latter section forbids any railway regulations which entail a preference or discrimination which, in the view of the Inter-State Commission, is undue and unreasonable and unjust to any State. Such restriction, however, is conditional on the Commonwealth Parliament passing a law imposing the prohibition.

The Commonwealth is also protected against the States by the prohibition against taxing property of any kind belonging to it.

In the Canadian Constitution we find no similar provisions with the object of safeguarding the rights of the Provinces as against each other, except that no Province may tax property belonging to any other Province. The Dominion also is protected against any abuse of their power to impose taxation for Provincial purposes by a similar reservation in favour of lands and property belonging to it.

In respect of one other matter within the legislative competence of the Canadian Provinces, their powers are hedged about with important restrictions. By section 93 the Provincial Legislatures may exclusively make laws in relation to education, but they are subjected to stringent conditions to safeguard the privileges of the various denominational and dissentient schools therein. No Provincial legislation may *prejudicially* affect the rights and privileges which any classes of persons had *at the time of the Union* in denominational schools, or deny the same privileges to the dissentient schools of Protestants and Roman Catholics as were enjoyed by Roman Catholics in Upper Canada (Ontario). The Provinces may, however, legislate with reference to denominational schools, so long as the laws passed are not prejudicial to their rights and privileges; and the only rights and privileges so protected are those which exist "by virtue of positive legal enactment, and not privileges enjoyed under exceptional and accidental circumstances, and without legal rights."

We have now examined in the respective Constitutions the distribution of powers between the National and Provincial Governments. But in many Federal States—and notably in the United States of America—this phrase, "the distribution of powers," is used in another connection, and is applied to the distribution of the governmental powers of the Federation among certain co-ordinate and independent authorities. As Mr. Dicey remarks, "the

principle of definition and limitation of powers harmonises so well with the Federal spirit that it is generally carried much farther than is dictated by the mere logic of the Constitution."

In the United States certain definite and limited powers are vested in the President as head of the Executive; certain other powers in Congress, and others again in the Judiciary; and the authority of each of these (which is directly derived from the Constitution) cannot be trenched upon by either of the other two. A system which thus keeps the different depositaries of the functions of government independent of each other is at direct variance with the principles of Parliamentary or Responsible Government, which dominate the English Constitution, and according to which the Executive is directly under the control of Parliament, to whose sovereignty indeed all departments of government are legally subject.

In Canada, as in England, there is no such distribution of powers. The principles of Responsible Government prevail, although there is no *legal* provision for them, and the Supreme Court is the creation of the Dominion Parliament, which within the sphere of authority of the Dominion is supreme.

In the Commonwealth, too, the system of administration adopted at its inception is that of Responsible Government. (The probability of its continuance is discussed later.*) At the same time, the Constitution Act "expressly and distinctly distributes between the Parliament, the Crown, and the Federal Judiciary, together with such courts of the States as shall be invested with Federal jurisdiction, the legislative, the executive, and the judicial powers exercisable under its authority." As long as the Commonwealth enjoys Responsible Government, and the Executive is thus under the control of Parliament, this distribution of powers between Legislative and Executive will be illusory; but so far as different spheres of authority are allotted to Legislature and Judiciary, there is imposed "upon the legislative authority of the Parliament a legal limitation which does not exist in regard to the Parliament of any other portion of the British Empire."

In thus granting the legislative and judicial powers to different organisations Australia has followed the example of the United States, and, like the Republic, has created two independent authorities, upon the sphere of one of which it is illegal for the other to encroach. And the comments of Judge Cooley on the American Constitution may be applied to the Australian:—"The grant of judicial power to the department created for the purpose of exercising it must be regarded as an exclusive

* *Vide* pp. 29 *et seq.*, pp. 45 *et seq.*

grant, covering the whole power, subject only to the limitations which the Constitution imposes, and to those incidental exceptions in cases where the exercise of judicial functions by the Legislature is warranted by Parliamentary usage, and is incidental, necessary, or proper to the exercise of legislative authority." Apart from this slight reservation, any attempt by Parliament to exercise functions, which are essentially and distinctly judicial, will be as *ultra vires* as an attempt to pass a law on some matter without the legislative power of Parliament under the Constitution.

The distinction between legislative and judicial functions has been briefly stated thus: "To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative." Once Parliament has passed a law it is the province of the Judiciary to interpret and apply it, and to determine what rights or liabilities have been created or arisen thereunder. Parliament can only control its operation thereafter by amending or repealing it. Parliaments have often found, when a law has been interpreted by the Courts, that its effects have proved to be different from their expectations, and have passed fresh laws to reverse those effects and make their intentions clear. But in the Commonwealth "any attempt by Parliament, under cover of a declaratory law or otherwise, to set aside or reverse a judgment of a Federal Court would be void as an invasion of judicial power."

Whether any such declaratory law is valid or not will depend on the purpose in the mind of the Legislature; "whether," in the words of Judge Cooley, "the design was to give the rule now declared a retrospective operation, or merely to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the Courts in the exercise of their undoubted authority have made." For that would be the exercise of judicial power in a most objectionable and offensive form.

In Canada, on the contrary, there are many decisions to show that legislation on a subject within the competence of the Dominion Parliament cannot be held to be invalid on the ground that it invades the judicial functions. The Dominion Parliament may, as the Parliaments of Australian Colonies have in the past done, pass a declaratory law, which actually reverses the decisions of Courts, and injuriously affects what the latter have declared to be the rights of individuals under the original law.

II.—WITH REGARD TO THE DIRECT ACTION OF EACH GOVERNMENT ON THE CITIZENS, INDEPENDENTLY OF THE OTHER:—

The consideration of this feature may be very briefly dismissed. In both Canada and Australia the Federal and Provincial Governments execute and enforce their laws, each through their own officers. We need only note two exceptions to this rule which exist under the Commonwealth Constitution with reference to the election of Senators. By section 12 the Governor of a State may cause writs to be issued for the election of Senators for that State; and by section 7 the names of the Senators chosen for each State are to be certified by the Governor to the Governor-General. The effect of these provisions is to make the State Governments, instead of Commonwealth officers, responsible for the due election of Senators.

III.—THE RECOGNITION OF THE STATES AS INDEPENDENT AND SEPARATE FACTORS IN THE CONSTRUCTION OF THE NATIONAL GOVERNMENT.

This principle is, both in Canada and Australia, embodied in the constitution of the respective Senates, which, like the American body of that name, represent the several States and Provinces as separate communities. In the Commonwealth the Senate is elected on the basis of the equal representation of the original States, a right of which they cannot be deprived without their own consent.

In the Dominion, though the principle of State equality is less completely recognised (the three maritime provinces being regarded as equivalent to each of the larger Provinces), the Senate is still constituted on the basis of State representation, the number of Senators given to the smaller Provinces being quite disproportionate to their population. This recognition of the States as independent factors has been carried still further in Australia by the provision for a minimum representation of the smaller States in the House of Representatives—a federal feature in an otherwise national House; and also in the provision that any proposed amendment of the Constitution requires for its passage a majority of electors in a majority of the States, as well as a majority of all the electors.

Further, in the formation of the first Administration, this principle, though not required by law, has been observed, each State having at least one representative in the Executive Council.

The adoption of the principle of equal State representation in the Australian Senate has been very adversely criticised as incompatible with the principles of responsible government. Responsible government means the conduct of the administration by Ministers responsible to the dominant

branch of the Legislature, which in England and all self-governing Colonies is the one which is paradoxically called the Lower House.

It is true that in Canada those principles have been unimpaired; but circumstances there, it has been pointed out, are far different. The Canadian Senate is not elective like the Australian. It is a nominated body, whose members are appointed for life ; and which, in its relations with the popular chamber over the all-important matter of supply, does not claim equal rights, but has always observed the constitutional usages regulating those relations which prevail in England and her self-governing Colonies. Further, in the event of serious conflict between the two Houses, in order to bring the Senate into accord with the House of Commons, application may be made to the King to direct the appointment by the Governor-General of three or six new members. Thus the Canadian House of Commons is always assured of its dominant position.

But in Australia it is an open question whether the House of Representatives will hold a similar position. The Senate is elected directly by the people of each State, and so is as popular as the former. Each Senator retains his seat for six years, as against the three of the member of the other House. But most important of all is the provision which gives the Senate equal power with the House of Representatives in respect of supply and other money bills, except as regards the right to originate and amend the same. Thus the Senate may reject such bills; and it is easy to imagine that, if ever the Senate finds itself at variance with the policy of an Administration which possesses the support of a majority of the Lower House, it will be able to throw out all supply and other money bills, and throw the Government of the country into confusion, until the clumsy deadlock provisions can be put into effect. Such a power is against all constitutional usage in other British colonies. The Upper Houses of some colonies (*e.g.*, Canada and New Zealand) have at times based a claim to equal rights over money bills on Acts conferring on them like privileges and powers to those enjoyed and exercised by the English House of Commons; but it has been definitely established, as Mr. Todd points out,* that such laws do not "warrant a claim by the Upper House to equal rights in matters of aid and supply to those which are enjoyed and exercised by the Commons; for such a claim, if insisted upon, would to a like extent derogate from and diminish the constitutional rights of the Lower House."

And in Canada, apart from the inherent weakness of a nominated body in a conflict with a representative body, pressure may be brought to bear upon a recalcitrant Senate by the appointment of uew members. There is,

* p. 705.

however, no similar provision in the Commonwealth Constitution, and the only means of terminating such a conflict lies in the clumsy deadlock provision, which requires a long time to pass before its ends can be attained.

Further, such a difference is most likely to occur over the financial policy of the Administration. For the Senate is to safeguard State interests, and these in many ways will be identical with their financial interests. As the Senate is constituted, the smaller and more necessitous States are in the majority, while in the House of Representatives they are in a minority. Thus, in financial matters, the policy of the latter chamber will frequently be at variance with that of the former; and a Government which enjoys the support of the Lower House will meet with the opposition of the Senate, which by reason of its wide powers will be able to very effectually embarrass it.

Thus the possibility of frequent disagreement between the Senate and a Ministry enjoying the support of the other House, together with the strength of the Senate in such case, seems to imperil that system of responsible government which is a priceless heritage won by our fathers after much bitter conflict.

IV.—THE AUTHORITY OF THE JUDICIARY AS INTERPRETERS OF THE CONSTITUTION.

The remarks on this characteristic, which we made in reference to Federal States generally,* may be applied exactly to the Constitutions of Canada and Australia. In both countries the Courts have continually to decide on the validity or invalidity of laws passed both by the Federal and Provincial Governments; and in both the Federal Constitution and Federal law is, in the last resort, interpreted by an *independent* body. In Canada this is the Judicial Committee of the Privy Council, which has constantly had to decide on the constitutionality of legislative enactments, and to determine the respective powers possessed by the Dominion and Provincial Parliaments. In Australia, until certain legislation is passed by the Parliament, there are two such independent tribunals of final resort: the High Court of Australia, and the Judicial Committee of the Privy Council. From a decision of the former on a Constitutional question there is no appeal to the Privy Council (as there is from the Canadian Supreme Court) except with the leave of the Court itself. But until the Federal Parliament passes a law making the jurisdiction of the Federal Courts exclusive in matters involving the interpretation of the Federal Constitution or Federal laws, as it is empowered to do by section 77, cases involving such Constitutional questions may be heard in State Courts, and an appeal made from their

* *Supra* p. 4.

decision direct to the Privy Council. There are many marked differences in both the constitution and extent of jurisdiction of the respective judicatures of Canada and Australia; but as they are fully dealt with elsewhere in this essay, it is unnecessary to recapitulate them here.

V.—THE SUPREMACY OF THE CONSTITUTION AND THE IMPOSSIBILITY OF AMENDMENT BY OTHER THAN AN EXTRANEOUS BODY.

We find this federal characteristic in the Constitutions of both Canada and Australia. Both the British North America Act and the Commonwealth of Australia Constitution Act are "supreme" laws, by which the validity of all enactments passed by the respective Federal and Provincial Legislatures is to be tested, and which prevent, by making illegal, any attempt by a Federal or Provincial organisation to exercise any power which is not expressly granted to or left resident within it.

Neither of these Acts, for the reasons detailed before,* can be amended by any one of the Legislatures which it creates, or whose existence it continues. The British North America Act can only be amended by the Imperial Parliament; the Commonwealth Act by that body, or by the direct vote of the people. Even in the latter case other conditions are required than a majority of the people of the Commonwealth. The proposed amendment must first be passed by an absolute majority of both Houses of Parliament, or of one House twice, the second time after an interval of three months, before being submitted to the people. And then, before being presented to the Governor-General for the Royal assent, it must be approved, not only by a majority of all the electors, but by a majority of electors in a majority of the States.

Amendment of certain definite sections is still further restricted by the provisions that "no alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or . . . . altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law."

These restrictions constitute a practically insurmountable obstacle to any alteration in the direction of making the Commonwealth more national or unified and less federal, while they also set great difficulties in the way of any other considerable alteration. In case of emergency, application might still be made to the Imperial Parliament, which of course can amend the Constitution Act, as it can amend the British North America Act, or

* p. 4.

any other of its enactments; but the Imperial Parliament is not likely to do so unless the opposition of an insignificant minority was enabled by these provisions to baulk the will of an overwhelming majority of the people of the Commonwealth.

Finally, it must be noticed that the power of the Australian people to amend the Constitution refers only to the Constitution proper—clause IX. of the Act 63 and 64 Vic., chap. 12—and not to the preamble and covering clauses. These can only be altered by the Imperial Parliament.

PART II.

We have now concluded the comparison of the two Federal Constitutions on general principles, and pass to the particular comparison as indicated in the preface to this essay.

The first matter which we shall discuss is the office and functions of the Governor-General in the respective Federations.

CHAPTER I.

THE GOVERNOR-GENERAL.

In both Canada and Australia a Governor-General appointed by the Crown is His Majesty's representative, and exercises such powers and functions of the King in domestic government as are assigned to him by statute and letters-patent and commission.

Even before the Federation—on the union of Upper and Lower Canada—the office of Governor-General of Canada had been created by the Crown by letters-patent. Accordingly the British North America Act does not provide for the creation of such an office anew, but assumes its existence, and permits it to owe its establishment and continuance to the prerogative of the Crown; so that the office of the Governor-General of Canada still exists by virtue of the letters-patent, though on the establishment of the Dominion the then existing ones were revised and new ones have since been issued, the effect of which is to give wider powers of self-government to the Dominion.

The Commonwealth Constitution, on the contrary, by section 2 expressly creates the office of Governor-General, and by section 61 expressly authorises him to exercise the executive power of the Sovereign over the Commonwealth. Section 2, in creating the office, contains one important clause, which at first sight seems to prevent in Australia the occurrence of a contention, frequently raised in Canada and other colonies, but never decided—whether a Governor is entitled *virtute officii* and independently of statute, letters-patent, or commission to exercise all the prerogative powers of the Crown relating to matters within the jurisdiction of the Legislature of the colony. This section says that the Governor-General may exercise such powers and functions as His Majesty may be pleased to assign to him, the logical conclusion from which is that he may exercise those and no others.

On the other hand, section 2 is placed under the heading of Chapter I. —The Parliament—and the section immediately preceding makes the Sovereign a constituent part of the Legislature; therefore this restriction may be interpreted to apply only to the exercise of the legislative functions of the Crown, especially as section 61 declares *without any reservations whatever* that "the executive power . . . is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative." Thus it seems that, as far as the Commonwealth is concerned, the question is still undecided.

Although the Constitution thus creates the office of Governor-General, the Crown has nevertheless issued letters-patent very similar to those creating the office for Canada, which purport to constitute the office of Governor-General and Commander-in-Chief, and assign to the holder of that office the powers and functions therein set forth. The issue of some such instrument was certainly necessary in order to confer on the Governor-General—in accordance with section 2—such power and functions as Her Majesty might be pleased to assign to him; but it is scarcely conformable to the requirements of legal exactness that, when an office is already created by statute, the same office should be also created by letters-patent. The Crown still determines those of its powers which are to be exercised by the holder of the office, and appoints him; but the office is created by statute, which in that respect has superseded the prerogative power.

Both in Canada and Australia the Governor-General occupies a dual position.

In the first place, he is the local representative of the Imperial Government, whose duty it is to safeguard Imperial interests in the colony, and to see that they are not prejudiced by any action, legislative or administrative, of the body politic of which he is the head. In this character, too, he is the official medium of communication between the Imperial Government and the colonial authorities or colonial subjects; for the proper performance of these duties, and for the due discharge of his office as a local constitutional ruler, he is responsible to the Imperial Government.

This brings us to his other and more important functions: those that he exercises as a local constitutional ruler—as the representative and agent of the Crown in the exercise of its powers in the domestic government of the colony.

1. He exercises the powers of the Crown as a constituent part of the Legislature. In both Constitutions it is provided that, when a bill on passing both Houses is presented to the Governor-General for the Royal assent, he may, according to his discretion, but subject to the Constitution Act, assent thereto, veto it, or reserve it for the signification of the King's assent. As a matter of fact, he will never veto a bill, but merely reserve any to which he thinks it would be improper to assent.

There is one somewhat important difference between the corresponding sections of the two Constitutions. The British North America Act requires the Governor-General to exercise the power *subject to his instructions*, while there is no such provision in the Commonwealth Act; so that, if ever instructions were to be issued to the Governors-General requiring them to reserve certain classes of bills, such as have hitherto been issued to

Governors of the Australian States, any such law, though assented to by the Governor-General, would in Canada be invalid. A similar law would, however, in Australia be perfectly valid until disallowed by the Crown; for, apart from any statutory provision, such as is inserted in the British North America Act, "conformity to the Governor's instructions is not a legal condition" to the validity of a law, unless the latter embody some statutory obligation.

In determining whether to give their assent to, or to reserve bills presented to them, both Governors must be guided by their own discretion and act on their own responsibility. It is, however, customary for them to receive from the Law Officers of the Crown in the colony a report on the question whether there exist any legal objections to a bill presented to them, and if they are still not satisfied they may refer the matter to the Imperial Law Officers. But even their assent is not conclusive, as bills, though assented to by them, may be disallowed by the Crown—Canadian bills within two years, Australian within one.

The section dealing with this power of the Governor-General in the Commonwealth Constitution contains one clause which is peculiar to it. This empowers him to return bills to Parliament with any amendment he may recommend. The object of this is to enable the Executive to correct inaccuracies and discrepancies, which frequently are not discovered until after a bill has passed through both Houses.

One more important legislative privilege of the Governor remains to be noticed. In both colonies no vote, resolution, or bill appropriating public moneys may be passed unless the purpose of such appropriation has first been recommended by him in the same session. The reason of this is that the Executive is responsible for the financial position of the country, and so must have reserved to it the sole control of national expenditure.

2. The Governor-General is also the head of the Executive. Both Constitutions declare the executive power to be vested in the Sovereign, and this power the Governor-General wields as his representative. It is in this character that the great majority of his functions are exercised. Some of these rest on statutes, both Imperial and Federal, while section 12 in the British North America Act and 70 in the Commonwealth Act confer on him the statutory powers of a Provincial Governor in connection with those departments transferred to the Federal Government. Others are derived from the Common Law, and are conferred upon him by the letters-patent, although it has been argued that the effect of section 61 of the Commonwealth Act is to place even these on a statutory basis.

Both classes of powers he exercises for the most part on the advice of a Council—in Canada called the King's Privy Council, in Australia the Executive Council. The members of this Council are appointed by the Governor-General, but in appointing them he observes the well-established principles of responsible government; that is to say, he selects them from the dominant party in the Lower House. The course invariably followed by him is to choose as Prime Minister the leader of that party, and allow him to nominate his colleagues.

The members of the Council may be removed by the Governor-General, but in practice a Ministry resigns when it loses the confidence of the Lower House. Only under very exceptional circumstances would he be justified in dismissing his Ministers, except that he may on the Premier's application dismiss a Minister who is a disturbing element in the Cabinet.

Such has been the invariable practice in Canada. With regard to the Commonwealth, we have given elsewhere* reasons for doubting whether the maintenance of this system will be compatible with the wide powers and influence of the Senate.

In matters of domestic administration the Governor-General acts with but few exceptions on the advice of this Council. In the case of his statutory powers, he is almost invariably required to do so; and in case of the prerogative powers he does the same by virtue of constitutional usage. The practice observed, however, varies in Canada and Australia. Of the former, Mr. Todd says: "The practice in Canada . . . has been that the business in Council is done in the absence of the Governor. On very exceptional occasions the Governor may preside; but these would occur only at intervals of years, and would probably be for the purpose of taking a formal decision on some extraordinary matter, and not for deliberation thereon. The mode in which business is done is by report to the Governor of the recommendations of the Council sitting as a committee, sent to the Governor for his consideration, discussed when necessary between the Governor and the Premier, and made operative by being marked 'approved' by the Governor."

In Australia the regular practice is for the Governor to preside at meetings of the Council, but what is done thereat is simply to formally advise and sanction the more important acts of State. The determination of what advice is to be given to the Governor is done by the Ministers sitting informally as a Cabinet under the presidency of the Premier. Thus the same result is achieved as in Canada—the discussion of policy apart from the Governor; but in Canada it is done by the legally constituted Council, in Australia in an informal meeting of a committee unknown to the law.

* See p. 29 *supra*, and p. 45 *infra*.

The most important executive functions of the Governor under both Constitutions are those of summoning, proroguing and dissolving one or both Houses of Parliament. The last represents one of the very few real checks and balances in the English constitutional system, whereby the Executive, which as a general rule holds office at the pleasure of Parliament, can dissolve that body and send its members back to their constituents, when there is reason to believe that they do not represent the views of the people. The knowledge that the Executive have this power in reserve operates as a useful check on the caprice to which all assemblies are liable.

Another important power committed to the Canadian Governor is that of recommending the Crown to direct the appointment of additional Senators. The object of this provision is to furnish a means of bringing the two Houses into accord in the event of serious conflict. This is a power similar to, but far less extensive than, the power of colonial Governors to appoint members to other nominee Upper Houses.

In the history of colonial government, the question, how far in domestic matters a Governor may act within his own discretion, and in disregard of the advice of his Ministers, has arisen chiefly over the exercise of the two last-mentioned powers—that of the dissolution of Parliament and of appointing, or recommending the appointment of, additional members to an Upper House. In Australia the Senate is elective, and no conflict on the latter question can arise. Even in Canada the question is not one of much importance, for the Governor is only empowered to advise the Crown to direct the appointment of the Senators; and the Secretary of State for the Colonies will use, as he actually did in 1874, his own discretion as to whether he will advise the Crown to direct the appointment.

With regard to the power of dissolution, however, the question of how far a Governor may use his own discretion and disregard the advice of his Council is always likely to arise. This power of dissolution, even in the Commonwealth, applies generally only to the Lower House. The Constitution, however, provides for a dissolution of the Senate simultaneously with the Lower House in the case of a deadlock between the two Chambers. In this case the Governor will act according to the advice of his Ministry; but in all other cases, as in Canada, the power of dissolving the Lower House is one of the discretionary powers of the Crown, in the exercise of which the Governor will act, sometimes according to, sometimes independently of, the advice of his Ministers.

The purpose of this power of dissolution is threefold. In the first place its purpose is to enable a Ministry which has sustained an adverse vote in the Lower House to appeal against that verdict to the people when there is reason to believe that the Lower House does not represent the opinions of the people.

In the second place its purpose is again to appeal to the people when grave conflict on some important question has arisen between the two Houses, and to ascertain their opinion on the matter. In Canada its great object is to bring the Senate to accede to the will of the Commons by gaining a definite expression of the popular will. In Australia, where the Senate is so powerful a body and does not suffer, like Canada, from the inherent weakness of a nominee body, there may possibly be frequent demands for its exercise for the purpose of bringing the two Houses into accord on the question in dispute. And it is conceivable that the Commonwealth may see a dissolution sought by a Ministry on sustaining an adverse vote in the Upper House—an unusual phenomenon in a British colony.

In the third place its purpose is to enable the Governor, as supreme guardian of the Constitution, to send back to its masters a Parliament which from caprice, factious spirit, and party divisions is unable to form a stable administration, which is its chief duty.

On constitutional principles, then, it seems that a dissolution is justifiable when any of the circumstances indicated above occur in the government of the colony. And although the frequency of elections is an evil which must be avoided as much as possible, in the event of such conditions existing, and his Council advising a dissolution, the Governor is bound to take its advice. On the other hand, when in the opinion of the Governor these conditions do not exist, he is not bound to graut a dissolution on his Ministry's application. Otherwise this power would be abused by them to stave off an adverse vote in Parliament, or in the event of defeat to gamble on the chances of a political election.

To sum up, it seems that the power of the Governor to dissolve Parliament is a discretionary power, in the exercise of which he will under certain conditions, recognised by constitutional practice, follow the advice of his Council; but in all other cases he will, while carefully considering all representations made to him by it, act on his own discretion in following or rejecting its advice.

In all other matters the Governor is, generally speaking, bound to act on his Council's advice. Exceptions will very rarely occur. Only when in his view his Ministers are advising him to do some illegal act, or are for party purposes inflicting grave injury on the community, will he refuse to follow their advice. If they then resign, he must find another Ministry to take the responsibility of his action before Parliament, or else either recall the former Ministry and acquiesce in their advice, or refer the matter to the Imperial Government; in the latter case it becomes a question between them and the colonial authorities.

In military and naval matters the Executive authority of the Governors-General is also considerable. The Commonwealth Act vests the command-in-chief of the military and naval forces of the Commonwealth in him as the King's representative. The British North America Act declares that command to continue, and be vested in the King only, so the Governor is not Commander-in-Chief; nor is he so constituted by the letters-patent and commission. "But he may in time of peace determine the object with which and the extent to which His Majesty's forces are to be employed." The Canadian Militia Act, however, provides that the command of the Militia may be exercised by him as His Majesty's representative.

In reference to the judicial system, both Governors have important administrative duties to perform. In Australia he appoints (in Council) the Justices of the High Court, and of other federal courts created by the Parliament, and may remove them, but only on an Address from both Houses of Parliament. In Canada he appoints the Judges of the Supreme Court, and of all the Provincial, County, and District Courts (except two Probate Courts). A Supreme Court Judge he may only remove on an Address from both Houses, on the ground of misbehaviour or incapacity; but other Judges may be dismissed on other grounds, including inability, old age, or ill-health, after inquiry by a Commission.

Furher, in the administration in Canada of the Criminal Law throughout the Dominion, in Australia regarding offences against Federal Laws, the Governor is entrusted with the Royal prerogative power of pardon. His exercise of this power is regulated by his instructions, which in both Federations, so far as this power is concerned, are drafted in the same terms.

The most important point to notice is, that, in granting pardon in capital cases, he is to act on the advice of his Council, in non-capital cases on the advice of a single Minister—generally the Minister for Justice. But in any case, capital or non-capital, in which such pardon or reprieve might directly affect the interests of the Empire, or of any country or place beyond the jurisdiction of the Dominion or Commonwealth, he must "take those interests specially into his own personal consideration in conjunction with such advice as aforesaid."

Before leaving the executive functions of the Governor-General, we must briefly refer to his control, peculiar to Canada, over Provincial Legislation (which he may exercise by disallowing Provincial enactments), and over Provincial Administration, by virtue of which he appoints and may dismiss the Lieutenant-Governors. These powers we have already discussed at considerable length, and at this point we need only remark that he exercises them on the advice of his Council. This was decided by the Imperial Government in the case of the dismissal of M. Letellier de St. Just, Governor of Quebec, in 1879.

3. The Governor of a self-governing colony is, as a general rule, never charged with any judicial functions. Under the British North America Act, however, an appeal lies to the Governor-General in Council "from any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education." And if the Governor's decision is not duly executed by the Provincial authorities, it may be enforced by legislation by the Dominion Parliament.

4. The Governor also represents the Crown in its august capacity, and in this character recommends the grants of honours and distinctions. Certain of these, indeed, he may bestow himself. In these days of cheap distinctions this function is not of much importance; but, nevertheless, it once gave rise to a constitutional dispute in Canada, where a Provincial legislature endeavoured to confer upon the Lieutenant-Governor the right to create* Queen's Counsel. It was decided by the Supreme Court that the Governor-General, as Her Majesty's sole representative in Canada, could alone grant this distinction. In Australia, however, where the State Governors are still representatives of the Sovereign, it seems that they retain their rights in this respect.

5. As the Governor-General is appointed by the Crown, he is responsible to it and the Imperial Parliament both for the proper performance of his duties as an Imperial officer, and for the wise exercise of his discretion as a local constitutional ruler.

To the Federal Legislature he is irresponsible. Inasmuch as in domestic affairs he acts as a general rule on the advice of his Ministers, it is they, and not he, who must bear the responsibility before the Parliament. If he refuses their advice, and they acquiesce, they are still responsible; but if they resign, he must find another Ministry to take the responsibility of his action; or if he cannot do that, either resign himself, or refer the matter to the Secretary of State for the Colonies. It would, therefore, be unconstitutional for the Federal Parliament to pass a vote censuring him personally for his conduct, except as a preliminary to a requisition to the Crown for his removal.

As to his legal responsibility, the Governor-General is not a Viceroy, and so does not enjoy the privilege of complete exemption from legal liability. For acts done in excess of the limits of his authority he may, according to the common law rule of the responsibility of public officials, be held liable. In respect of all torts, personal contracts and debts he is civilly liable, and may be sued in the local courts, even during his term of office. For crimes also committed by him he is liable; and criminal proceedings are to be tried in the Court of King's Bench.

* Lenoir *v.* Ritchie, 3 Can. S.C.R.

CHAPTER II.

THE EXECUTIVE.

According to the theory both of the Canadian and Australian Constitutions, the Executive government is vested in the Sovereign, and exercised by the Governor-General, who is aided and advised by a Council—called the Privy Council in Canada, the Executive Council in Australia. But, in reality, in Canada and in Australia hitherto this executive authority of the Governor has been exercised according to the principles of responsible or cabinet government. That is, the execution and maintenance of the laws of the respective Federations, and the administration of the great departments of the Public Service, are controlled by that Council, which, though nominally only an advisory body, is the real depositary of the executive authority. That Council is a Committee of the Legislature, whose members are selected by the Governor from the dominant party in the Lower House, and hold office only as long as they retain the confidence and support of that House. In addition to being members of the Council, the majority are also heads of the great departments of the Public Service. Each Minister is allowed considerable discretion in the administration of his department; but the determination of the general policy of administration lies with the Ministry as a whole; and each Minister must subordinate his individual views and wishes to those of the whole body, or, if he is unwilling to do so, resign. The unity of the Cabinet is rendered necessary by another of the peculiar features of this system—the collective responsibility of the Ministry. Each Minister shares a collective responsibility with his colleagues for everything of importance that is done in any branch of the administration. "Every important piece of departmental policy is taken to commit the entire Cabinet, and its members stand or fall together."

These principles rest in the main on the conventions of the Constitution, and are only indirectly sanctioned by legal rules. But, while in the British North America Act there are absolutely no provisions directly prescribing this system, it is partially recognised in the Commonwealth Act. Thus section 64 definitely says that the officers appointed by the Governor to administer the Departments of State are to be "members of the Federal Executive Council and the Queen's Ministers of State for the Commonwealth." The same section requires them to possess seats in one of the Houses of Parliament within three months of their appointment.

A Minister, if appointed while a member of the House of Commons in Canada, or of either House in Australia, must by the respective Constitutions resign his seat, as he thereby accepts an office of profit under the Crown, though he is eligible for re-election.

A Senator in Canada, however, does not vacate his seat. The Canadian member of the House of Commons and the Australian member of the House of Representatives both seek re-election from their former constituents. But the case is far different with an Australian Senator. His acceptance of office occasions what the Constitution calls a casual vacancy, and by section 15 such are filled, not by popular election, but by the Houses of Parliament of the State, which he represented, sitting together; or, if these be not in session, by the Executive Council of the State. Thus, while the member of the Lower House may at any rate be nominated for re-election by his old constituents, the Senator's place is to be filled by a body, which he never directly represented, and before whom he may never even be nominated. Even if he should be re-appointed, his re-election is only temporary. When he has been chosen by the Executive Council, he only retains his seat till fourteen days after the beginning of the next State session, when a fresh re-election is necessary. And in both cases he only does so till the next general election of members of the House of Representatives, or election of Senators for the State, whichever first happens.

This necessity imposed on newly-appointed Ministers of seeking re-election has largely, and with good reason, been regarded as an out-of-date provision which has outgrown its usefulness and justification. But when it entails such a complicated result as the above, it merits immediate abolition. At any rate, it is a serious defect in the Commonwealth Constitution that it does not provide a simpler method for the re-election of Senators, whose seats are vacated by the acceptance of office. The probable effect of this provision will be that Senators will not be appointed heads of departments, but will be Ministers without portfolios, so that they will not need to resign.

The observation of this peculiar law has led us to digress somewhat from the description of the Cabinet system. We resume this by discussing the object and effect of the system.

The great purpose of the Cabinet system is to produce harmony between the Legislature and Executive, and so to ensure efficiency of government. Administration, to be strong, resourceful, and efficient, requires the constant aid of legislation. And when the Executive chiefs are a Committee of the Legislature, who, in addition to their other functions, guide and direct the legislative action of Parliament, and determine the majority of measures to be brought before it, they can obtain its concurrence in all acts which facilitate their administration.

Further, this fusion of the executive and legislative powers strengthens the Legislature also. For, when the body, which is entrusted with the execution of its laws, is a committee of its own members responsible to it, it can ensure that its laws be properly and energetically administered, or secure the dismissal of the Executive if they fail to do so.

This admirable system has been followed with complete success in the government of the Dominion ever since its establishment; and within the short life of the Commonwealth it has as yet met with nothing to threaten its security. But there is good reason to believe that its continuance is incompatible with certain provisions of the Constitution, the effects of which have not yet had an opportunity to make themselves felt. The sanction of the unwritten laws, on which the Cabinet system depends, is found in the power of Parliament to withhold the necessary supplies for carrying on the business of the Government, until the Ministers appointed by the Crown or the Crown's representative command their confidence. The smoothness of working of the system depends on this power being in the hands of one House alone—the popular House; to which, therefore, the Executive is responsible. Otherwise there would be the absurdity of a Ministry responsible to two Houses of possibly divergent policies. But in the Commonwealth, although the Lower is the national, and the Upper the States House, yet both are popular in the sense of being elected directly by the people; and the Senate, although theoretically restricted, has practically the same power over supplies and taxation as the House of Representatives. It may reject all money bills; and, though it may not amend such, it may at any stage return to the Lower House any such bill, requesting by message the omission or amendment of any items or provisions therein. And "whether the mode in which the Senate should express its desire for an alteration in money bills is by an amendment in which they request the concurrence of the House of Representatives, as in other cases, or by a suggestion that the desired amendment should be made by the latter House as of its own motion, seems to be a matter of minor importance. A strong Senate will compel attention to its suggestions; a weak one would not insist on its amendments."*

Further, it is in questions of financial policy that differences between the two Houses will be most likely to arise. In the Lower House, elected on a population basis, the smaller States will be in a minority; in the States House they will form a majority. Their interests will require as large a revenue as possible to be gained through customs and excise duties, in order that the refund to their State Governments under section 87 may be as large as possible. Such heavy taxation will be contrary to the interests of the larger States; and, further, there are sure to be differences over bills distributing the surplus revenue among the States "on such basis as Parliament deems fair" according to section 94. Thus, the policy of a Ministry supported by the Lower House may be violently opposed by the

* Paper presented by Griffith, C.J., to the Queensland Government.

Senate; and if the latter refused the Ministry supplies, in order to compel a change of Government, this result would seem to be inevitable. On the other hand, the Lower House may refuse confidence and supplies to their successors. The Canadian practice of dissolving the Lower House to secure the expression of the sense of the nation, and thus to bring pressure on the Senate, will not solve the difficulty; for the Australian Senate, being directly elected, will represent the opinion of the people as States. Such a difficulty might be settled by compromise, as, indeed, it must, if the Government is to go on; but a succession of such difficulties would conceivably lead to the adoption in practice of some other mode of determining the tenure of office of Ministers. If such a change does eventuate, it will entail a complete revolution in the political ideas of the Commonwealth, and will occasion one of the strongest contrasts between it and the Dominion.

The administration of the Departments of State is thus both in Canada and Australia at the present time presided over by Ministers, who are political officers, and who change with each change of Government, according to the varying fortunes of parties in Parliament. With the exception of these heads of departments, however, all the other officers are permanent officials, whose tenure of office does not, as in the United States, depend on the length of time during which the political party with which they are indentified stays in power. The appointment of the chief permanent officers rests with the Governor-General in Council, but that of the subordinate officers is in Canada regulated by a Civil Service Act. Under this Act the appointments are in the hands of the political head, but his powers are considerably restricted by the provisions of the Act. The Public Service Act recently passed by the Commonwealth Parliament provides for a non-political mode of appointment of officers, other than the permanent heads of departments, this power being vested in Commissioners, who are permanent officers, and free from political influence. This method prevents the "jobbery" and corruption incident to political appointments, and should serve as an effectual impediment to the introduction of anything approaching the "spoils system" of America.

To the greater range of powers vested in the Dominion than in the Commonwealth is due the fact that the former has thirteen departments of State, while the latter has only seven. Certainly in many cases one Australian department has the oversight of matters which are distributed in Canada among several, but in the latter a similar department has more business under its control.

One Australian department has no parallel in Canada—that of External Affairs. But what external affairs there are to be administered by a Colonial Government is a mystery to all, except perhaps to the officials of the department. Hitherto it seems to have confined its functions to those of a department of immigration and emigration.

CHAPTER III.

THE LEGISLATURE.

In both Federations the Legislature consists of the Crown, a Senate, and a second House of Parliament, called in Canada the House of Commons, in Australia the House of Representatives. The legislative functions of the Crown have already been considered*; and it only remains to deal here with the constitution and powers of the two Houses.

THE SENATE.

The constitution of the Federal Senate, and its position in the body politic, are two of the most distinctive features of Federation. Unlike most Upper Houses, it is not simply a revising or restraining body, but a Council of States (or Provinces) representing the States *qua* States. It is the visible expression of the principle that they are to be regarded as separate and distinct elements in the body politic. In this character it stands out in contrast to the other House, which is the national Chamber, representing the people as individual members of the nation. But in Canada the Senate, though ostensibly a Council of Provinces, is really nothing more than a revising and restraining body. This is due to the fact of its being a nominee body; and so it suffers from the inherent weakness of such a body, when it comes into conflict with a representative body.

Further, though constituted on a basis of Provincial representation, the principle of equal representation has not been observed. Its members are appointed for life, and are the nominees, not of the Provincial, but of the Dominion Government. Senators must indeed be residents—or in the case of one Province freeholders—in the Province they represent; but the fact that they are appointed by the Dominion Government makes it very improbable that the Senate could ever effectually represent the cause of Provincial rights against any encroachment of the central power. The Senate is composed of 81 members, who represent the component Provinces as follows:—Each of the Canadas have 24 members; the same number is assigned to the three Maritime Provinces together (two of whom were original Provinces in the Federation); British Columbia has three, Manitoba four, and the North West Territories two representatives respectively. Besides this the Sovereign may, on the application of the Governor-General, direct the appointment of three or six new Senators, one or two (as the case may be) from each of the Canadas and from the Maritime Provinces. But,

Vide p. 36 *et seq.*

according to constitutional usage, such power is only to be used in an emergency, the increase of members to be merely temporary, and no further Senators to be summoned from the Provinces named until they regain their normal representation, except in the event of a like direction by the Crown.

Contrary to this mode, Australian Senators are directly elected by the people voting as States. Each original State has six Senators—for any new State Parliament is to determine the number of representatives; and in each State the people vote as in one electorate, except in Queensland, where owing to the divergent interests of North and South, the State Parliament may divide the State into various electoral divisions.

Each Senator holds office for six years in the event of there being no dissolution of the Senate. In the first Senate, however, and immediately after a dissolution, half the number of Senators have only a three years' tenure. Thus there will be an election of three Senators for each State every three years; and a regular rotation will be observed in the retirement and election of members.

Regarding the qualifications of a Senator, the Commonwealth Constitution is much more democratic than the Canadian. A Canadian Senator must be 30 years of age, natural-born or naturalised, possessed of real property, and have a property qualification of 4,000 dollars over and above his debts and liabilities. He must also be a resident in the Province which he represents, except in the case of Quebec, where it is sufficient if he has his real property qualification therein. Further, he must not be concerned in a contract with the Government, except as a shareholder in a public company, that has with the Government a contract not relating to the building of a public work.

Disqualification is entailed if he fails to attend in his place for two consecutive sessions; becomes a subject, citizen, or adherent of a foreign power; is adjudged insolvent, or takes the benefit of a law relating to insolvents; is convicted of felony; or ceases to be qualified by property or residence (except when as an officer of the Government he must reside at the capital).

On the other hand, an Australian Senator need be only 21 years of age, natural-born, or at least five years naturalised, and a resident of three years within the Commonwealth. He must also be qualified to be an elector. Until a Federal electoral law is passed this qualification is determined by the law of the State he represents, and requires residence within the State, but generally no property qualification. Also, by section 44, he must be under no allegiance or adherence to a foreign power; nor be under sentence of imprisonment; nor an undischarged bankrupt or insolvent (this is a stricter provision than the Canadian qualification); nor enjoy a pension out

of the Commonwealth revenues; nor hold an office of profit under the Crown, other than that of Minister of a State or the Commonwealth; nor must he be pecuniarily interested in an agreement with the Commonwealth, except as a member of an incorporated company of more than 25 persons. Unlike the Canadian exception in favour of shareholders of companies, this will apply to the building of a public work.

A Senator's seat is vacated if he become subject to any of the above disabilities; takes the benefit of any law relating to insolvent debtors; is absent for more than two consecutive months without leave; or takes, or agrees to take, any fee or honorarium for services rendered to the Commonwealth, or in the Parliament to any person or State. This last is a very stringent provision, peculiar to Australia, and open to considerable criticism. It applies also to members of the House of Representatives, and would prevent any member of Parliament from being briefed to defend the Commonwealth in an action-at-law, or from appearing before a select Committee on behalf of any person or State. Hitherto some of the most notable statesmen of England and her colonies have been leading barristers. This provision will deter such men from entering Parliament, and the injury to the Commonwealth entailed by the loss of their services will outweigh any that might arise from the danger of corruption.

THE HOUSE OF COMMONS AND HOUSE OF REPRESENTATIVES.

The Lower House both in Canada and Australia is the National Chamber. While the Senate represents the States as separate political entities, it represents the people as individual units in the nation. Consequently it is elected on a population basis, each State or Province sending a number of representatives proportionate to its population. In Australia, however, a minimum number of five must be returned for each State. But both Houses, though national in character, possess a federal element, in that they do not divide the whole nation into electorates, but provide for a certain proportionate representation from each State. The number of members, and the mode by which proportionate representation is secured, differ under the different Constitutions. In Canada there is a decennial adjustment of representation after each decennial census. The basis of such adjustment is, that to the Province of Quebec 65 members are assigned, and to each of the other Provinces such a number of members as would bear the same proportion to the number of its population as the number 65 would bear to the population of Quebec. The last adjustment was under a law of 1892, under which the number of members was 213. Whether these increase or not depends on how little or how much the population of Quebec increases as compared with that of the rest of the Dominion.

In Australia, the numbers of House Representatives are to be determined by the fact that they are to bear, as far as practicable, the constant ratio of two to one to the Senate. The proportion to be returned by each State is to be determined thus : A quota is to be obtained by dividing the whole population of the Commonwealth by twice the number of Senators. The number of people in each State is then to be divided by the quota, and the result will give the number of members apportioned to that State. Nevertheless, every original State is to have at least five members. The present number of members thus determined is seventy-five. Parliament may alter the numbers, but subject to the following restrictions, namely, the maintenance of the three principles of the constant ratio of two to one to the numbers of the Senate, the proportionate representation on the basis of population, and the minimum representation of the smaller States. The stress laid on the maintenance of the constant ratio of two to one is due to the desire to prevent the Senate being overborne by the predominant numbers of the Lower House on those occasions when the two Houses sit and vote together. As to the qualifications of members, in Australia these are the same as those of Senators; and those disqualifications, the entailing of which requires the resignation of a Senator, apply also to a member of the House of Representatives. In Canada no property qualification is required of any member. He must be a subject of the Crown by birth or naturalisation, and must not suffer from certain stated disqualifications, the chief of which are as follows:—Membership of the Senate or of a Provincial Legislature; the holding of an office of profit under the Government of Canada on the nomination of the Crown (this, however, does not apply to Ministers of the Crown); interest in a contract with the Government (the rules in this connection are the same as apply to a Senator); and convictions within eight years of corrupt practices at elections. A member who becomes subject to any of these disqualifications vacates his seat.

The duration of the Canadian House of Commons is five years, as against three in the case of the House of Representatives. Both, however, may be sooner dissolved by the Governor-General.

The privileges, immunities, and powers of the two Houses, and of the members and committees of each House, are declared by both Constitution Acts to be such as are defined by the Parliament. In Canada these are restricted by the proviso that any Act defining such powers, privileges, and immunities is not to confer more than are exercised and enjoyed by the Imperial House of Commons at the time of passing such Act. In accordance with this provision the Dominion Parliament has passed a law conferring these wide privileges on the constituent Houses and the members thereof. No similar Act has been passed in the Commonwealth; but in accordance

with the Constitution Act both Houses enjoy and exercise the same privileges and powers as did the Imperial House of Commons at the passing of the Commonwealth Act.

Members of both Houses in both Federations are paid for their services.

In Australia each member receives £400 a year; in Canada they receive a sessional allowance of $1,000 and a grant for travelling expenses in addition. This, however, is liable to be reduced by deductions for non-attendance; and if a session does not exceed 30 days, they are allowed only $10 a day. Under both Constitutions there must be a session once at least in every year.

THE RELATIVE POWERS OF THE TWO HOUSES.

Speaking generally, both Houses, in legislating upon those matters within the jurisdiction of Parliament, have co-ordinate powers. In regard to money bills—that is, bills imposing taxation, or appropriating revenues or moneys—the Senate is subject to certain restrictions. In Canada these rest partly on statute, and partly on constitutional usage. In Australia they are all imposed by the Constitution Act.

Thus the British North America Act, section 53, requires all such money bills to originate in the House of Commons. Further, it has now been established by constitutional usage that the Senate may not amend such bills, nor alter the provisions of any bill so as to impose an additional charge upon the people. And even the right of the Senate to reject money bills is of doubtful validity. Certainly it would not be justified in refusing supply to an Administration.

Under the Commonwealth Act the abatements from the co-ordinate powers of the Senate are clearly defined, and there is no opportunity allowed to constitutional usage to establish further derogations. For section 53, after declaring certain restrictions, concludes with these words:—"Except as provided in this section the Senate shall have equal power with the House of Representatives in respect of *all* proposed laws." The restrictions imposed by this section are that bills imposing taxation, or appropriating revenues or moneys, shall not originate in the Senate; that the Senate may not amend bills imposing taxes or appropriating moneys for the ordinary annual services of Government, nor any law so as to increase any proposed charge on the people. But though it may not amend any such bill, the Senate may at any stage return it to the Lower House suggesting amendments. We have already* given reasons for believing that the effect of the last-mentioned provision is to render quite illusory the attempted restrictions on the Senate by denying it the power to amend. The Senate's right to reject such bill is also admitted, and the whole result is to make it

* *Vide* p. 45 *supra*.

practically co-equal in powers over taxation and supply with the Lower House. These are the all-important powers in the determination of the relations of the two Houses. The Canadian Senate does not possess them, and is consequently subordinate to the House of Commons. The Commonwealth Senate possesses them, and therefore in all probability will be really co-ordinate with the other House; while other provisions regarding its constitution may even enable it to occupy a predominant position, and to become the paramount authority in the legislature of the Commonwealth. The possibility of this happening, and its probable effects on the system of responsible government, have already been discussed in this essay,* and so it is unnecessary to repeat the discussion at this point. Certainly there is no matter in respect of which a more striking contrast can be drawn between the respective Constitutions than in the position and authority of the Senate in the Federal polity.

The peculiar constitution and strong position of the Commonwealth Senate, as compared with other Colonial Upper Houses, has led to the introduction in the Constitution of an elaborate provision for the solution of deadlocks between the two Houses. In Canada, the only means of terminating similar deadlocks is by the Dominion Government obtaining a direction from the Crown to appoint additional Senators, to bring the Senate into accord with the Commons. This is, however, a reserve power, resort to which may be only had in cases of special emergency. Its exercise, combined with the force of public opinion, will always secure the accession of the Senate to the wishes of the Commons when the position of the latter represents the views of the people. But, according to the provision in the Commonwealth Constitution, the majority in the Senate, if it is sufficiently large, and able to command in its support a sufficiently large minority in the Lower House, may make its will prevail over the majority in the Lower House. The provision in question declares that in the event of the Senate rejecting twice, or failing to agree twice on the terms of, a bill proposed by the House of Representatives—the second time after an interval of three months, but in the same or next session—the Governor may simultaneously dissolve the two Chambers. Such dissolution may not take place, however, if the House of Representatives is within six months of expiry by effluxion of time. If, after the re-election of Parliament, there is still a deadlock regarding the same bill, a joint sitting is to take place; and the bill, before it can be passed, must be carried by an absolute majority of the two Houses sitting together.

This provision is a new experiment, and its operation will afford an interesting study to students of political institutions.

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* *Vide* p. 29 *et seq*, p. 45 *et seq*.

CHAPTER IV.

THE POWERS OF THE PARLIAMENT.

The distribution of the legislative authority between the Federal and Provincial Parliaments, and consequently the powers assigned to the Federal Parliament, have already been discussed at considerable length in Part I. of this essay. But, in addition to the many comparisons that were there drawn between the two Constitutions, there are numerous points raised by an examination of the respective sections which deal with the powers of the Parliament, in which it is interesting to further compare the two Federations. Such comparisons might be followed out to an indefinite length. We shall confine ourselves to what we regard as a few of the more important points of similarity and contrast.

I.—Although the Dominion Parliament is invested with a general authority to legislate over all matters not specially placed within the Provincial jurisdiction, the British North America Act enumerates a large number of subjects in reference to which it has power to legislate; and, as is only to be expected, many of these are identical with those enumerated in the Commonwealth Constitution. To detail these identical subjects would be tedious.* We shall only note a few differences that appear even in respect of these identical subjects. Thus the power of the Dominion Parliament over the postal service is not necessarily extended, like that of the Commonwealth, to the control of telegraphic and telephonic services. Again, while the authority of the Commonwealth over Banking does not apply to State Banking within the limits of the State, banking in Canada is exclusively a Federal concern. Marriage, again, is a subject which in both countries is a Federal matter, but the Dominion power does not extend to legislation regarding the solemnisation of marriage in a Province. Both Federal Parliaments have power to legislate with reference to navigation, shipping, and railways. But the Commonwealth has no such general control of all railways, canals, steam and other ships, and public works, as is conferred on the Dominion by sub-section 10 of section 92. In such case the Dominion Parliament has merely to declare that the general interest of the Dominion or of two or more Provinces is concerned, and it immediately may assume exclusive control. While the Commonwealth has wide powers of regulating the conduct of State railways, and may control them for military purposes, it may not acquire the same without the consent of the

* See British North America Act, section 91; Commonwealth Act, sections 51, 52, 98, and 105.

State, nor may it construct new railways or extend existing ones without a like consent. The Dominion on its establishment took over all railways belonging to the Provinces, and may itself construct, or authorise the construction of, new railways. As the Commonwealth may not construct railways without a State's consent, it follows that it cannot authorise their construction.

II.—With respect to the matters placed under its control, the Dominion Parliament has been granted plenary powers of legislation by the British North America Act. But under the Commonwealth Act the Parliament is continually being subjected in the exercise of its powers to a number of restrictions. Its wide and general power of taxation is qualified by the condition that it is not to discriminate between States or parts of States. It may grant bounties on the export or production of goods, but such bounties must be uniform throughout the Commonwealth. It may authorise the construction of railways, but must first gain the consent of the State through which the railway is to pass. Its general powers over commerce also are restricted by a prohibition against laws which give preference to one State over another: over navigation by one against laws which abridge the right of a State or its residents to reasonable use of the waters of rivers for irrigation and conservation. All these restrictions are intended to safeguard the rights of the States; but the Canadians have not regarded the insertion of similar provisions necessary to protect the rights of their Provinces. As Mr. Lefroy remarks, these prohibitions evince a distrust of the honesty and fairness of Parliament, which is characteristic rather of American than British ideas.

III.—One of the most important and far-reaching powers vested in the Parliaments of the Dominion and the Commonwealth is that to make laws regulating trade and commerce, involving, as it does, power and authority over the many subjects covered by those words, and over many things ancillary thereto.

In Australia the authority covers a narrower sphere than in Canada. It applies only to the regulation of commerce with other countries and among the States, and does not extend to those commercial operations which are confined within the limits of a single State. No such restriction is imposed on the authority of the Dominion. That embraces all commercial operations within the Canadian Provinces and territories, although, "in its construction, the broad comprehensiveness of the words has to be limited by reason of certain powers conferred upon the Provincial Legislatures over matters closely connected with the operations of trade and commerce."*

*For examples see the following cases:—Hodge *v.* Queen, L.R. 9 Ap. C.A. 117; Harris *v.* City of Hamilton, 1 Cart. 756; Bennett *v.* Pharmaceutical Association of Quebec, 1 Dorion Q. App. 336.

Further, this power in Canada is vested exclusively in the Federal Parliament. The Commonwealth Constitution, in granting a similar power to its Parliament, does not expressly declare it to be exclusive, except in so far as it is coterminous with the exclusive control over customs, excise, bounties, and those departments of the public service transferred by section 69. It seems to follow then that, except in relation to the subjects mentioned, the Parliaments of the States will have a concurrent jurisdiction over matters connected with foreign and inter-State commerce, until their laws are overridden by Federal legislation. Nevertheless, it has been recently contended* that this Federal power over trade and commerce must be interpreted as exclusive. This conclusion has been reached in two ways. First, it has been argued that regulation of inter-State commerce by State legislation cannot but conflict with the declaration in section 92 that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

This section, of course, will not affect foreign commerce, but that is covered by the second source from which the conclusion is drawn—the decision of the United States Courts in interpreting a similar grant of power. There, though the American Constitution does not declare the federal power over foreign and inter-State commerce to be exclusive, the Courts have repeatedly declared State laws regulating commerce to be void, except where they incidentally affect it in the exercise by the States of their undoubted authority over the "police power"—the power "to protect the lives, limbs, health, comfort, quiet of all persons, and to protect all property within the State;" or where they merely make important regulations to meet local necessities. The three fundamental principles which have guided the Courts to this conclusion have been summed up in the judgment in the case of Robbins v. Shelby County Taxing District†: "The Constitution . . . having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive, whenever the subjects of it are national in their character or admit only of one uniform system or plan of regulation." But that there were also certain matters which imperatively demanded the diversity which alone can meet local necessities, and that on such matters the States could still legislate, was decided in Cooley v. Wardens of Philadelphia,‡ which upheld a State navigation law.

But later, upon this rule was superimposed "the additional rule that, where Congress has refrained from legislation in any matter relating to trade and commerce, which is within its exclusive control, its silence is to be

* By Mr. Justice Clark, of Tasmania. † 120 U.S., 489. ‡ 12 How. U.S., 299.

taken as a declaration of its intention that the matter shall be free from any legislative regulation or restriction."

The third principle is that the only way in which commerce can be legitimately affected by State laws "is when by virtue of its police power . . . a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property." Earlier decisions, indeed, declared that "Congress may not prescribe any rule to govern commerce which prevents the proper and reasonable exercise" of this power; but later it has been determined that, while a State may still in passing laws on matters primarily within its police power incidentally affect commerce, positive Federal legislation conflicting therewith will override even legitimate State legislation on the subject.

Arguing on analogy from these American decisions, and relying also on section 92, Mr. Justice Clark has contended that the Federal power over foreign and inter-State commerce must be interpreted as exclusive.

On the other hand the opposite view seems to be established by the terms of sections 107 and 108, the former of which expressly saves the powers of the State Parliaments in all matters not exclusively vested in the Commonwealth or withdrawn from the State; while the latter provides that every State law "relating to any matter within the powers of the Parliament of the Commonwealth shall, subject to the Constitution, continue in force; and that until the Federal Parliament provides therefor, the State Parliament "shall have such powers of alteration and repeal in respect of any such law" as it had before Federation.

To this the reply may be made—first, that though not expressly so, yet the power over commerce has actually been vested exclusively in the Commonwealth, and so section 107 will not apply; and, secondly, that the last clause of section 108 is badly drafted, and, if literally interpreted, absurd, in that it would permit States to amend and repeal laws on matters under the exclusive control of the Commonwealth; that the last clause should have been drafted, and will be construed thus: "the Parliament of the State *in respect of any matter within its legislative power* shall have such powers of alteration, etc.; and that, therefore, it will not apply to the commerce power, if decided elsewhere to be exclusive.

The obvious answer, however, to the whole contention is, that our Courts will not be bound to pursue the same course of reasoning, and to reach the same conclusions as the United States Courts; that their decisions will have merely a persuasive, not an authoritative effect. However, even if decided to be concurrent, the power of a State over inter-State commerce

must be very rarely exercised, or it will conflict with that absolute freedom of inter-State trade established by section 92. Their powers over foreign commerce will be wider, if admitted by the Courts.

But whether the Commonwealth power to regulate inter-State and foreign commerce be exclusive or not, there is one important limitation on this power in favour of the States, and one noteworthy exception to its expressly exclusive control of import and export duties, which demand attention. Section 113 vests complete and exclusive control of the liquor traffic in the separate States, by subjecting all intoxicating liquids passing into a State (from another State or from a foreign country), or remaining therein for use, consumption, sale or storage, to its laws, as if they had been produced there. In Canada Provincial laws *regulating* the liquor traffic have been declared valid by reason of the Provincial power to legislate on municipal institutions and local affairs, and to impose shop, saloon and tavern licenses. But they may not prohibit the sale of intoxicants, as an Australian State may do, as that would be in direct conflict with the Dominion control of trade and commerce. Further, it has been held by the Privy Council that, under the general authority of the Dominion Parliament to make laws for the order and good government of Canada, it may authorise the inhabitants of a city or county to prohibit the sale of intoxicants*, and that such laws, when made applicable to a Province, will override Provincial legislation regulating the traffic.

Again, despite the exclusive right of the Commonwealth to impose import and export duties, a State may levy such charges on goods passing into it or out of it as may be necessary to execute its inspection laws. To prevent the abuse of this power, however, the net produce of all charges so levied is added to the Commonwealth revenues, and the Parliament may annul the State laws imposing the charges. Further, the Courts may refuse to enforce them if, in their opinion, a State under the cover of such inspection laws is really interfering with the freedom of inter-State trade, guaranteed by section 92.

The Federal power to pass laws regulating trade and commerce involves, as a necessary adjunct thereto, the power to regulate the means of transport, and especially to control the conduct of railways. This extension of the power is definitely prescribed by section 98 of the Commonwealth Constitution. In Canada also not only is it granted by sub-section 10 of section 92, where Parliament, on declaring a railway to be for the general advantage of Canada, ousts all Provincial jurisdiction; but the Dominion, at its establishment, assumed property in all the Provincial railways, and may construct

* Russell *v.* The Queen, L.R. 7 Ap. Ca. 829.

or authorise the construction of new railways. Further, it can prevent a province from constructing new railways by vetoing the authorising Acts, as it has done in the past, on the ground of their being opposed to the general policy of the Dominion.

No such wide powers are enjoyed by the Commonwealth. It cannot acquire State railways without the consent of the State concerned, nor extend existing, nor construct new railways without a like consent. Its power is one merely to superintend the management and regulate the conduct of railways the property of others,* and especially in the direction of preventing the frequent wars of differential rates, whereby the various States have endeavoured to divert trade from its natural channels, in order to have goods carried on their own lines and shipped at their own ports. To prevent this, Parliament has been expressly empowered to forbid such, or any other unjust preference or discrimination. But even this power is hedged with reservations. In prohibiting such rates, due regard is to be had to the financial responsibilities incurred by a State in constructing and maintaining its railways; and no rate is unlawful which is adjudged to be necessary for the development of the territory of the State. These and similar provisions call for the exercise of a considerable amount of adjudication on the questions raised thereby. For the decision of such questions the Constitution prescribes the establishment of a semi-judicial, semi-administrative body—the Inter-State Commission. It is invested with the power, in the event of dispute, of deciding what rates are necessary for State development, and what preference or discrimination is undue, unreasonable or unjust. And unless the rate, preference or discrimination is condemned by this body, no law of the Parliament can render it unlawful. In addition to this it may be invested with a very wide general authority; it is to have "such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance . . . of the provisions of the Constitution relating to trade and commerce and of laws made thereunder." Thus it may possess considerably larger powers than that body which has suggested its creation—the American Inter-State Commission—which has simply "authority to enquire into the management of and control the conduct of the business of all common carriers engaged in the transportation of passengers or property by railroad and partly by water, from State to State or to foreign countries." There is no similar institution in Canada, although the Railway Committee of the Privy Council has power to regulate the running of railways, and a law has been passed requiring all railway tolls to be charged, under the same circumstances, equally to all persons.

* In case of military necessity wider powers may be assumed by sec. 51, sub-sec. 32.

4. In Australia the Criminal Law is left under the cognisance of the State Parliaments, and criminal jurisdiction generally is to be exercised by the State Courts. In Canada, on the other hand, Criminal Law and the determination of Criminal Procedure has been transferred to the sphere of the Dominion Parliament, although the Constitution of the Courts of Criminal Jurisdiction still remains within Provincial control. Nevertheless, a limited jurisdiction in criminal matters has been vested in the Provincial Legislatures of Canada and the Federal Parliament of Australia. The former may still make laws imposing punishment by fine, penalty, or imprisonment for the purpose of enforcing any Provincial law regarding a matter within its competence. A similar power is conferred on the Commonwealth Parliament by the sub-section, which empowers it to legislate on matters incidental to the execution of any power vested in the Parliament, the Government, the Judicature, or any Federal department or officer.

In both cases the power to enact penal laws implies the power to regulate the procedure requisite for their enforcement; but that of the Commonwealth is subject to the conditions that the trial or indictment of any offence against its laws must be by jury, and held in the State in which it was committed.

5. Despite the fact that the Dominion has been granted a far wider sphere of authority than the Commonwealth, there are yet a number of powers conferred on the latter which find no parallel in those of the Dominion. These powers may be divided into two classes. The first comprises those which seem to admit, contrary to the general Colonial policy of the Empire, a right in the Commonwealth Parliament to legislate extra-territorially. For example, the fifth of the covering clauses of the Constitution Act declares that its laws shall be in force on all British ships (except ships of war) whose first port of clearance and whose port of destination are in the Commonwealth. The only similar law applicable to Canada is that section of the Merchant Shipping Act which gives legislatures in all British possessions the right to regulate their coasting trade. But such legislation must contain clauses suspending their operation till the Royal pleasure has been signified, and is not capable of conferring on the Parliament such wide extra-territorial jurisdiction as clause 5.

Further, the Commonwealth Parliament may pass laws regulating Fisheries in Australian waters beyond territorial limits. Canadian legislation on the subject of fisheries, it has been decided, is of no effect beyond the three mile limit. Australian laws, however, will only affect British subjects. Otherwise this power will be in conflict with International Law.

Again, amongst the powers enumerated is that to pass laws regarding the relations of the Commonwealth with the islands of the Pacific. This at first sight seems to entail a right of extra-territorial legislation, but probably it merely implies that "the Pacific Islands are specially within the Australian sphere of influence, so far as is compatible with Imperial law and existing treaties."

Finally, there is the power to legislate on the subject of external affairs. This cannot mean that the Commonwealth is to control its own foreign relations. All that it can be justified in doing under cover of this clause is to provide for its representation in other countries for commercial purposes by means of accredited agents; to pass "laws authorising commercial treaties through the Imperial Government, but with the assistance of its representatives," and, perhaps, to pass the same kind of legislation as that which the Canadian Parliament is empowered to do as being "necessary or proper for performing the obligations of Canada or any Province, as part of the British Empire, toward foreign countries" arising under treaties therewith.

The second class includes a number of miscellaneous powers which, though not extra-territorial, are not exercisable by the Dominion. One of these is the power to legislate on matters referred to the Parliament of the Commonwealth by any State or States. The resultant legislation is, however, only to affect those States which have referred the matter or which adopt the law. One effect of the provision may be to enable the Commonwealth Parliament to make provision for the uniformity of laws relative to property and civil rights in the State, in the same way as the Canadian Parliament may. The latter's Acts, however, to be operative in a Province, must be adopted by its Parliament. Further, such legislation if adopted puts the subject thereof under the exclusive control of the Dominion. No similar result is entailed in an Australian State by submission to Federal legislation.

Another of these powers is that detailed in sub-section 38 of section 51, whereby the Federal Parliament may, with the consent of a State or States, exercise certain powers capable of being exercised in the Commonwealth, but not enumerated among the Federal powers, nor yet vested in the State Parliaments.

6.—Before leaving the subject of the powers of the Parliament, we must notice that the powers of all the Legislatures, Federal and Provincial, within the limits prescribed are plenary powers, such as belong to a sovereign Parliament, and not those of a merely delegated body. Two decisions of the Privy Council, and one of the Supreme Court of Canada, establish the truth of this.

First, Hodge v. the Queen* decided that Provincial Legislatures "were in no sense delegates of, or acting under any mandate from, the Imperial Parliament." That when the Imperial Parliament enacted that there should be a legislature for a Province, and "that its Legislative Assembly should have exclusive authority to make laws for the Province, and for provincial purposes in relation to the matters enumerated, . . . it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed, as the Imperial Parliament in the plenitude of its power possessed, and could bestow. Within these limits of subject and area the local legislature . . . has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have under the like circumstances to confide . . . to a body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail."

In the City of Fredericton v. the Queen,† the judgment of the Supreme Court declared—"And so with the Dominion Parliament, with respect to those matters over which legislative authority is conferred, plenary powers of legislation are given as large, and of the same nature as those of the Imperial Parliament itself."

And in Powell v. Apollo Candle Co.,‡ the Privy Council decided that a Colonial Parliament "is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or delegate."

The effect of these cases is to establish the right of all the Parliaments to delegate any of their legislative powers. This is contrary to the constitutional rule prevalent in the United States where, in the words of the judgment of the Supreme Court in the case of Field v. Clark,§ "the legislature cannot delegate its power to make a law."

* 9 Ap. Ca. 117. † 3 Can. S.C.R. ‡ 10 Ap. Ca. 282. § 143 U.S. 649.

CHAPTER V.

THE JUDICATURE.

We have already * contrasted at some length the judicial systems of Canada and Australia. We have shown that that of Canada is national rather than federal in character, and affords a striking contrast to the dualistic system of the Commonwealth, under whose Constitution provision is made for the existence in each State of two distinct judicial systems, one exercising a federal and inter-State jurisdiction, the other administering the laws of the State and exercising jurisdiction over the subjects of the State, although the High Court will entertain appeals from both.

In both countries the legislative and executive powers necessary for securing the efficient administration of justice are distributed between the Federal and Provincial authorities. In Australia the distribution is determined by federal principles; in Canada it is in accordance with the national character of the system. The administration of justice in the Province, including the constitution, maintenance, and organisation of the courts, both of civil and criminal jurisdiction, is placed under the control of the Provinces. But, inasmuch as the Criminal Law is within the jurisdiction of the Dominion, the provinces cannot determine the procedure in criminal matters. And, although the provinces constitute and organise their courts, the Dominion appoints the judges. On the other hand the constitution, maintenance, and organisation of the Court of Appeal, and of any other courts deemed necessary for the better administration of the laws, is entrusted to the Dominion. The latter, too, provides for the establishment and maintenance of penitentiaries, although, inasmuch as the provinces also have a limited criminal jurisdiction, they, too, may establish penitentiaries of their own.

Very different is the distribution of powers in the Commonwealth. All the legislative and administrative powers necessary for the organisation, equipment and maintenance of the Federal Judicature, and for determining its jurisdiction, so far as it is not already determined by the Constitution, are vested in the Federal Parliament and Government.

The States still control the constitution of their own Courts, appoint the judges thereof, and generally provide for the administration of justice according to their own laws and between their own subjects. They still manage their prisons, but are required by the Constitution to provide for the

* pp. 12 *et seq.*

detention and punishment of persons convicted of offences against the laws of the Commonwealth.

Owing to the more national character of the Canadian judicial system, its statute book contains no elaborate definition of the subjects of Federal jurisdiction similar to that in the Commonwealth Act. There is, however, one statute which provides for the investment of two Dominion Courts with a certain amount of essentially Federal jurisdiction. The Act establishing the Supreme and Exchequer Courts provides that both, or the former alone, may have a special jurisdiction in controversies between the Dominion and the Province, or between Provinces, or in cases in which the question of the validity of a Dominion or Provincial Act has been raised, if the Province or Provinces concerned pass Acts authorising the assumption of such jurisdiction.

The subjects of the Federal jurisdiction of the Commonwealth Courts we have already* detailed. They include, or may be extended by the Federal Parliament to include, all the above-mentioned matters. Two of these concern actions against a State or Province, which may be sued by the Federation or by another State or Province. In addition, the Commonwealth Courts may hear suits between one State and a resident of another State. But such provisions, it is submitted, in spite of a United States decision† to the contrary on a similar grant of jurisdiction, only confer a jurisdiction and not a right of action, where no right existed before. They merely enable certain suits, which might otherwise have been brought in other Courts, to be brought in these Federal Courts. Without express provision, a State or Province, that is to say the Crown, cannot be sued without its own consent. One qualification must be made in this as far as an Australian State is concerned. In respect of matters within the limits of the judicial power of the Commonwealth, but only in respect of such matters, the Federal Parliament may make laws conferring a right to proceed against a State.‡

According to the Commonwealth Constitution, the judgment of the High Court in all appeal cases shall be final and conclusive. The Canadian Act establishing the Supreme Court also enacted that the judgment of the Court should be final and conclusive, "saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative," thus leaving to litigants the right of appeal to the Privy Council by special leave. The Commonwealth Act also leaves unimpaired the Royal prerogative except in one very important class of cases, namely, decisions of the

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* See p. 13. † In Chisholm *v.* Georgia, 2 Dallas 419. ‡ Section 78.

High Court on any question, *however arising*, as to the limits *inter se* of constitutional powers of the Commonwealth and those of any State or States; or as to limits *inter se* of the constitutional powers of any two or more States. In such cases the Royal prerogative to grant special leave to appeal from the decision of the High Court is expressly barred. Only if the High Court itself certify that the question is one which should be determined by the Crown in Council, will an appeal lie, and then it will lie without further leave. Thus it will not lie within the province of the Judicial Committee to construe and elucidate the Commonwealth Constitution, and develop its underlying principles, as they have done for the Dominion—a work which a prominent Canadian jurist* regards as "invaluable."

This limitation of the Royal prerogative to hear appeals from all Courts of the Empire was one of the features of the Commonwealth Bill which evoked most adverse criticism, and which met with the strongest opposition from the Imperial authorities. The present provision is the result of a compromise between the latter and the Australian delegates. Even in this modified form it has been criticised as denying the people of the Commonwealth the great advantage of having their constitutional disputes adjudicated by a tribunal above all suspicion of sectional or party bias, and of having the Constitution elucidated and developed by the best jurists in the Empire. On the other hand, in almost all constitutional questions it is necessary to have regard to the actual conditions and needs of the nation; and where legal considerations are evenly balanced, the decision of the Court should be determined by an enlightened regard for the welfare of the nation. A Court, unaware of all the bearings of a constitutional question, is liable to take a too technical and literal view of the Constitution, and so to give it a rigidity which would check its legitimate expansion, and produce internal irritation. The Privy Council has always been markedly strict and literal in interpreting the Canadian Constitution; and had that Constitution endowed the Dominion with a limited, instead of an indefinite, area of powers, its decisions might have considerably hampered its constitutional development.

In Australia the Commonwealth, like the Federal Government of the United States, has been invested only with certain definite powers. Its legitimate expansion then requires that, in interpreting the grant of those powers, the Courts should be guided by the great Chief Justice Marshall's cardinal idea, "that the creation of a national government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes."

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* Mr. Lefroy.

Such a principle of interpretation is, we submit, much more likely to recommend itself to Australian than to English judges. And too great strictness and literalness of interpretation would be much more prejudicial to the interests of Australia than to those of Canada, where strictness and literalness is rather to be desired on account of the different method adopted in the distribution of powers.

CHAPTER VI.

FINANCE.

One of the most difficult problems that faced the statesmen both of Canada and Australia was the adjustment and determination of the financial relations between the Federal and Provincial organisations. The arrangements finally adopted are in both Constitutions very unsatisfactory; and one of the first constitutional conflicts in the Parliamentary history of Canada arose over the demand of Nova Scotia for "better terms" than those granted by the British North America Act.

A close connection between Federal and Provincial organisations with regard to finance was, as we have shown, necessary. To the Federal Government, in both cases, was committed the exclusive control over duties of customs and excise. These duties had been the chief source of revenue in all the colonies before Federation, and they could not afford to surrender them wholly, and thus be forced to fall back on other methods of raising revenue to meet their obligations.

In Canada the solution of the difficulty adopted was to make the Dominion liable for Provincial debts up to a certain amount, and to return to the Provinces definite annual subsidies toward the expenditure of government.

A very large proportion of the customs revenue in Canada, as in Australia, was absorbed by the payments of the interest on the public debts. Canada was therefore made liable for the debts and liabilities of each Province existing at the Union; but where the Provincial debts exceeded certain amounts, which were differently fixed for different Provinces, each Province so involved was made liable to the Dominion for the sum in excess, and was charged with payment of interest on such excess. Similarly, if the debt of any Province did not amount to the sum fixed, the Dominion had to pay that Province interest on the difference between the actual amount of the debt and the stipulated amount.

In addition to thus relieving the Provinces of large sources of expenditure, the Dominion pays yearly to each Province a definite subsidy and a *per capita* grant according to the numbers of its population.

From the first these financial arrangements caused dissatisfaction amongst the Provinces, and especially in Nova Scotia, where a large party appeared, which agitated for a repeal of the Union. Ultimately, however, they abandoned this demand for a repeal in consideration of the concession

of "better terms," which took the form of a grant of additional allowances to the Provinces, calculated on increased amounts of debt, as compared with the maximum fixed by the terms of the British North America Act.

Inasmuch as the Dominion, in addition to the stipulated payments, may, if so authorised by Parliament, make further grants to the Provinces, similar agitations for better terms are always liable to recur. There is also constant political manœuvring to obtain federal subsidies in aid of many objects, which are really provincial in character. The result is that these financial provisions are a constant source of jealousy, friction and unrest.

Under the Commonwealth Constitution the Federal Government is not made liable for the debts of the States. It may, at its discretion, take them over, or a proportion thereof, but the States must indemnify the Commonwealth in respect of all debts so taken over; and the interest payable on such debts is to be retained out of the surplus repayable to the States; or if such surplus be insufficient, the deficiency must be made good by the States.

The States, being thus liable for their debts, have even more need than the Canadian Provinces for a return of a large proportion of the customs and excise duties collected by the Commonwealth. This is especially made clear when it is remembered that according to the latest statistics of the various States, in each State the amount raised by customs duties and that spent in payment of interest on the public debt almost balance each other.

Accordingly for 10 years at least, and thereafter until Parliament makes other provision, the Commonwealth must return to the States three-quarters of the net revenues arising from customs and excise, or apply it to the payment of interest on such State debts as may be assumed. For five years after the imposition of uniform duties the particulars of this repayment are to be determined by an elaborate system of book-keeping, whereby each State is to be credited with the net amount of duties paid by its people, and debited with an amount of Federal expenditure proportionate to its population, the balance being then repaid to it.

Five years after the imposition of uniform duties, Parliament may abandon this system of distribution for one "on such basis as it deems fair." This clause leaves a way open for great dispute and conflict, especially between the larger States, which have other sources of income than customs duties, and the smaller States which rely almost solely on that source for their revenue, and so have been called the "necessitous" States—that is States to whom the revenue arising from customs and excise duties are an absolute necessity to enable them to maintain their solvency.

The probability of conflict is further heightened by the section which gives Parliament power to "grant financial assistance to any State on such terms and conditions as Parliament thinks fit."

While the "Braddon Blot" (section 87) and section 93 are in force the only direct payments which can be made to any State under such provision must be made out of the one-quarter of the customs and excise revenues raised by the Commonwealth, or out of direct taxation imposed for that purpose by the Commonwealth.

In five years time, however, this section may furnish some of the necessitous States with a lever whereby to enforce a distribution of the surplus, which, though manifestly disproportionate and apparently inequitable, may be justified as a form of that financial assistance for which the Constitution provides.

Otherwise—at any rate while the "Braddon Blot" is in force—the only method whereby the Commonwealth can grant financial assistance to a State is by imposing other taxation for that purpose, or by assuming a certain proportion of the State debt, and relieving the State from all liability for the same. The objection to this means, however, is that this will be practically equal to the grant of a *permanent* subsidy, equal to the interest payable on such amount, which will be continued even after the immediate need of the State for financial assistance has passed.

But, whatever form of granting financial assistance may be adopted, the section leaves the way open for designs on the Federal Treasury, similar to the demands for better terms in Canada, and is, in our opinion, pregnant with grave consequences in the shape of constant plots to plunder the Commonwealth for the benefit of needy, greedy, and extravagant States.

CHAPTER VII.

NEW STATES (OR PROVINCES) AND TERRITORIES.

In both the British North America Act and the Commonwealth Constitution Act provision is made for the admission or establishment of other Provinces (or States) than those thereby federated, and for the acquisition by the Federal Parliament of authority over certain territories not included in the category of Provinces or States. Section 146 of the British North America Act definitely contemplated the admission of the colonies of Newfoundland, Prince Edward Island, and British Columbia, and provided for the same being effected by Order in Council on addresses from the Dominion Parliament, and from the respective Legislatures of the colonies. In accordance with this section, Prince Edward Island and British Columbia have been admitted as Provinces of the Dominion. Further, the same section provided for the admission of the North West Territory and Rupert's Land, or either of them, on an address from the Houses of Parliament of Canada to the Crown on conditions approved by the Queen. An Order in Council of 1870 surrendered these territories to the Dominion; and to remove all doubts concerning the powers of the Dominion over them, and any other territories, the British North America Act of 1871 was passed, which declared that the Parliament of Canada might establish new Provinces in any territories being part of the Dominion, but not included in any Province, and that it might confer a constitution on such Province. But once a Province has been given a constitution, the Dominion Parliament may not amend the same. The same Act further permitted the Dominion Parliament, with the consent of the Legislature of a Province, to alter the limits of such Province, and any territory thereby surrendered by a Province, and not added to another, becomes one of the territories of the Dominion, in respect of all of which the Parliament may, by the same Act, make provision for their administration and good government. Before this Act was passed, the Province of Manitoba had been formed out of the North West Territories, and given a Constitution similar to that of the other Provinces. Yet another enabling Act in respect of these territories has been passed by the Imperial Parliament, by which the Dominion is definitely empowered to grant representation in the Senate and House of Commons to the people of any of the territories. Thus at present the Dominion of Canada comprises seven Provinces—Ontario, Quebec, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, Manitoba, and two territories, Keewatin and the North West Territories.

Chapter VI. of the Commonwealth Act confers similar powers on its Parliament with certain points of difference from the provisions of the British North America Act. It may admit or establish new States, but the admission of other colonies (or rather colony, New Zealand being the only one outside the Federation) does not require the intervention of an Order in Council. It may also make laws for the government of any territories surrendered by a State, or placed by the Crown under its authority, or acquired in any other way; and it may form new States out of such territories or parts thereof. Similarly the Parliament may also alter the limits of a State; but not only is the consent of the State Parliament necessary, but the question must also be submitted to the electors of the State, and be approved by a majority thereof.

In addition to these general provisions regarding the acquisition and government of territories, there are also special provisions regarding the territory for the Federal Capital. The requisite territory must, if Crown land, be granted to the Commonwealth by the State of New South Wales. In the Capital the State will have absolutely no jurisdiction. Under the Constitution the Capital will have no separate representation in Parliament, but may be granted municipal institutions.

The particular lands to be set apart for the purpose must be determined by treaty between the State and Commonwealth Governments.

In Canada the Capital of the Dominion was determined by the British North America Act. The place named therein is Ottawa, the Capital of the old Province of Canada. Ottawa is not, as the Australian Capital must be, separate Federal territory, but is a city within the limits and jurisdiction of the Province of Ontario. The Australian Capital is not only to be a Federal city, but is to be situated amidst a tract of Federal territory at least 100 square miles in area.

CONCLUSION.

"All government," said Burke, "is founded on compromise," and in no form of government is compromise more imperative than in that of a Federation, with its constant need of reconciling conflicting interests of state and nation. But in every such system one of the two opposing powers will obtain the larger share of authority, and occupy the predominant position. From the foregoing comparison of the Canadian and Australian Federations it will be seen that, according to the law of the Constitution, this predominance has fallen to different organisations in the different countries. In Canada the terms of the compromise are such that the nation stands in the more commanding and powerful position—a position in which every phase of its development sees it more firmly established In Australia provincial considerations and provincial interests have, according to the Constitution Act, retained for the States a larger share of authority. Yet in America, where, at its inception, the Federal Government was invested with less extensive powers than those granted to the Commonwealth, constitutional development has been such that the Federal authority has been constantly gaining ground at the expense of that of the States.

Will a similar development take place in Australia? At first sight this seems difficult, in some respects even impossible, of attainment by reason of the obstacles set in the way of the amendment of the Constitution. But despite all legal obstacles, constitutional development, in whatever direction it tends, will ultimately be determined by the trend of popular sentiment and of public opinion. For "all free governments, whatever their name, are in reality governments by public opinion," and it is on the quality of the public opinion, and of the sentiments of the people of Australia, that its national development depends If in years to come Federal Union leads to an abatement of inter-provincial jealousy and suspicion, and to a recognition of the fact that the matters in which the interest of the various States are the same are far greater in number and importance than those in which they are at variance, a stronger national sentiment will be born, which will produce, either by constitutional amendment or judicial interpretation, a development of the Federal compact or compromise, so as to secure a closer union, and a broader and fuller national life.

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